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CITIZENSHIP

BY

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To
MY WIFE
JANE HART BLOOMINGDALE MAXSON

PREFACE

This book is not an Introduction to Political Science. Neither is it a summary of American law with the motto suggested to an ex-president, " Citizens, behave yourselves." Its subject is Citizenship. The sub-title might be " Status and Fundamental Rights." It deals with the acquisition and loss of citizenship, the privileges and immunities which are the content of citizenship, and the exceptional law designed to meet the conditions of special classes of persons. Therefore in addition to normal law on fundamental rights there is abnormal law or the law of persons. Accordingly great problems of present interest come within the scope of this study, such as immigration and naturalization, segregation of negroes and amalgamation of Indians with the whites, a ban upon coolie labor and intercourse with oriental peoples on the basis of equality and friendship, the question whether organized society shall give special protection to women and children or unsex women legally and abandon public guardianship over children, and finally the question whether corporations shall be treated as outlaws or as persons and citizens. The questions which arise under normal law are equally vibrant with present interest. But even to suggest them would unduly prolong a mere word of explanation upon the purpose of the book and its origin.

The author was associated with two remarkable lecturers, the one dealing with the powers of government and the other dealing with the rights of the governed. One course was called in earlier years " Constitutional Law " and the other, " Citizenship." The lecturer on Citizenship was called to high public service and the author was given the course more than a decade ago. He was also teaching in both graduate and undergraduate schools Comparative Government and Comparative Jurisprudence. He takes his training and life's experiences into his study of Citizenship. The course, substantially as given in this book, has been successful in the teaching of both young men and young women. A number of young women have entered the study of law and into preparation for specialized service, and attribute to the course a deciding influence. The author does not expect the student or reader to agree with him always, for he sometimes is not in agreement with American doctrine, but presents the world doctrine instead. But he believes mightily in law, a growing thing, not static, and in its enforcement. He believes in property and insists upon its protection. He believes in human beings and sees a vision of their progress. The head of the department suggested the publication of the lectures. All but the two chapters on Corporations were written in the university year of 1928–1929, and the remaining chapters were written in the present university year.

Philadelphia, February 1, 1930.

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CHAPTER I

DEFINITION OF CITIZENSHIP AND RIGHTS AND DUTIES OF CITIZENS

I. The Definition of Citizenship

1. *Membership in Aryan Tribe*

When the pursuit of the Science of Politics takes us to the new capitol of the state of Wisconsin at Madison we find a court room of incomparable beauty. On the four sides are great panel pictures representing four beginnings in the science of law, in the protection of fundamental rights. One represents the first trial in the territory of Wisconsin, a hundred years ago. The Indian Chief Oshkosh is being tried on the charge of murder, but in defense he sets up the claim that the Indian killed by him had committed a crime which made him liable to the vengeance Oshkosh had taken upon him. The jury returned a verdict of acquittal, recognizing the validity of tribal law in the case of this Indian. This tribal law has its counterparts in the earliest stages of Roman law and in the most ancient books of the Hebrew Scriptures. Another picture represents the beginning of American law. It is the signing of the federal constitution at Philadelphia. Washington sits in the chair of the presiding officer. Franklin, the reputed founder of the University of Pennsylvania, stands in a group on one side. Madison and Hamilton are engaged in conversation on the other. Very near Washington stands Jefferson. But Jefferson, we protest, was not there, but it is more significant to remark that the federal constitution was not a code of new laws but of old ones — provisions, rights, privileges — that strike their roots through colonial history deep into the past of the mother country. A third picture represents the beginning of English law. King John is signing Magna Charta, but the barons in 1215 were demanding for the most part the guaranty of rights and privileges which were the heritage of a still more distant past. The remaining picture represents the beginning of Roman law. Augustus Caesar sits as judge in the trial of one of his own generals, charged with crime. But Roman law was older than the empire; it reached back to the adoption of the Twelve Tables in the year 451 B.C., and the Twelve Tables were simply the codification of laws previously existing. The study of the status of citizenship and the rights of citizens takes us back not only to the American Revolution and to Magna Charta, but to the ancient city republic and the primitive Aryan tribe.

The patriarchal organization of society in competition with the matriarchal or the totemic came to occupy all the best parts of the earth, forcing peoples practising other systems into the cold or hot or out-of-the-way parts of the world. This was because the patriarchal system had the greater advantage of solidity and discipline.[1] The father of a family, until incapacitated by age, had almost absolute dominion over his family. His wife left her own family and its peculiar religious rites and was inducted into her husband's family. His dominion included his children and grandchildren, no matter what their ages, though his daughters on marriage ceased, of course, to be of his family.[2] This *pater familias* was united with others in a gens or house, which also had its peculiar rites and was presided over by an elder who represented the common ancestor of the group of families.[3] Several gentes were combined into a phratry or curia which also had its rites and its chieftain. Several phratries were combined into a tribe which again had its rites and its chieftain. The tribe was thus supposed to be composed of blood relatives — to be the descendants of a common ancestor, although as a matter of fact adoption was recognized all along the line. Individuals or groups could thus be added to a society organized under the patriarchal system, but they all became one society with a common religion and a common ancestor. These tribes had their fixed customs or laws and religious injunctions which pursued the members wherever they wandered. It was impossible, unthinkable to break away from the system. Did one try to escape obedience he might be done to death, enslaved, or declared an outlaw. This was the iron system that made men strong of body and mind, and pure of blood.[4]

2. *Citizenship in an Ancient City-State*

Thus we have seen that an Aryan tribe was organized not on the basis of territory but of kinship. When one or more tribes built a citadel in which to take refuge in case of attack, to hold their markets, and celebrate their religious festivals, there grew up in time about their common hearth a city as a center for a larger agricultural region and its numerous dependent villages. Citizenship in such a city, carrying the right of suffrage and special privilege, had no relation to birth within the walls or even residence there. Membership in the families, gentes, phratries, and tribes which united to found the city, conferred the right of citizenship. Successive generations of aliens might be born in such a city, live and die there, without admission to citizenship. In Athens there was a numerous population of this kind. It was the policy there from time to time to admit considerable numbers of these aliens to the body of citizens. There was a slave population outnumbering the citizens many times, and composed mostly of barbarians, purchased and captured. These slaves were in many cases very worthy and useful members of society. It was the policy to emancipate and enfranchise selected members of this class. Thus the state was measurably relieved from the menace of insurrection, and it was strengthened and enriched by new blood. The infusion of new blood, when good blood, proved by character and attainment, always regenerates the state which receives it. Sparta by remaining a proud oligarchy was obliged to become an armed garrison keeping down an embittered subject population. Spartan virtues were everywhere praised, but that wonderful state contributed little to the general progress of mankind. But Athens by becoming a great democracy became too the chief university town of the ancient world, and contributed more than any other state to philosophy, science, and art. The splendid civilization of ancient cities was always in danger of destruction or, at least, deterioration at the hands of aliens and slaves — in danger from without and from below.[5] Thus citizenship in an ancient city republic meant birth not within the jurisdiction of the city, but birth to a father who was a citizen, or it meant introduction into this status of kinship by adoption.

This principle is illustrated by the status of the Apostle Paul though he belonged to a later period than the one described. He belonged to a Jewish family of rank residing at Tarsus. He was a citizen of Tarsus, not because he was born there, but because his father was a citizen of Tarsus. At a time when some Jewish and other provincials of Asia Minor rejoiced in the boon of Roman citizenship, which was later cheapened and bestowed on all provincials, Paul was able to claim the special protection of a Roman citizen, not because he or his forebears had ever seen Rome, but because this prized status had come to him by inheritance.[6] This conception that citizenship was a status acquired by inheritance by a child, born in lawful wedlock, from a father who was a citizen, was transmitted by the Roman law to all the modern countries, or nearly all, that derived their legal systems from Rome. This is a characteristic legal conception of continental Europe — the law of blood.

3. *Status of Subjects According to the English Common Law*

Very different from the law of blood is the law of the soil. The feudal system in all its flower of anarchy never flourished in England as on the continent, yet on the continent it was supplanted by the Roman law, but in England and the United States many feudal principles survive in the law. One of these relates to status. According to the feudal system a serf or villain was attached to the soil, and freemen, possessing any sort of title to land, whether copy holders or free holders, were all tenants of the king as territorial overlord. They held their lands under feudal tenure. Englishmen chivalrously glorified their king as the symbol of their country. They were proud to be called subjects of the king of England, not citizens of England. Therefore Blackstone described their status in his day as follows: " The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominion of the crown of England . . . , within the . . . allegiance of the king; and aliens, such as are born out of it." [7] This is just the opposite of the Roman law principle. That was the law of blood; this is the law of the soil. A Roman citizen was such because his father was a Roman citizen. An English subject was such because he was born on territory belonging to the king of England.

Exceptions, however, were made to this rule more in accord with continental usage. These exceptions to the principle of the common law were made by statute. After the Restoration in the time of Charles II the children of royalist refugees were declared subjects. At a still earlier time modification of the rule had been made in the interest of commerce. Therefore by statute before 1776 children born out of the king's allegiance whose fathers or fathers' fathers were natural-born subjects were deemed to be natural-born subjects themselves.[8]

4. *Status of Inhabitants of the American Colonies*

Such was the common law and statute law of England on the subject of citizenship in 1776, and such was the law upon the status of the inhabitants of the American colonies, inherited from England, though there was some uncertainty as to the application here of the statutes mentioned above. Certainly the children of Dutch, Swedes, Finns, and Germans, born here, were subjects of the king of England, no matter what they were according to continental law. The assembly of Pennsylvania did not hesitate to naturalize Dutch, Swedes, and Finns, who received a favoured position in the transfer of New York to the English. The assembly with the consent of Penn did pass an act naturalizing all foreigners who had come to the province, but this act was repealed by the privy council. Then the assembly resorted to special acts of naturalization, giving in each instance the reasons for the enactment. In 1740 Parliament authorized naturalization of Protestants in the colonies and the assembly of Pennsylvania passed an act which excluded foreign-born Roman Catholics, Jews, and Socinians. Yet aliens were permitted to hold property in Pennsylvania, and their children born here were natural-born subjects of the king of England.[9] The laws of Pennsylvania were regarded as unusually liberal, but they serve to illustrate the status of persons born in the king's allegiance as distinguished from aliens, persons not so born.

Though Penn gave a liberal invitation to aliens to come to his Quaker Valley the settlers, mostly Friends, soon came to fear the influx of foreigners. Accordingly the assembly imposed a duty on all aliens as a check upon immigration. Even earlier and with greater reason they took steps to prevent the importation of vagabonds and felons, the dregs of the British population.[10] Thus we see the colonies in the spirit of the ancient city-states attempting to protect their citizenship from a too large introduction of aliens and also from the danger of receiving undesirable immigration from the home land.

5. *Citizenship Under the American Constitution*

When the revolted colonies became states the common law of England was still their law, and applicable statute law of England was also regarded as part of the common law, but, as stated, it was uncertain whether the statutes declaring certain classes born outside the allegiance to be deemed natural-born subjects, did or did not apply in the new states. Accordingly all persons born in a colony or naturalized there were citizens of the new state. And so when the federal constitution was adopted all citizens of the states became citizens of the United States, natural-born if born in the United States and naturalized if admitted to citizenship by the United States or previously by the states.

Thus apparently Alexander Hamilton, born in the British West Indies, was not a natural-born citizen of New York or of the United States, but in effect a naturalized citizen, yet he was eligible to any office, for the federal constitution provided that, "No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution shall be eligible to the office of president." [11]

An explicit definition of citizenship was not added to the constitution till the 14th Amendment, adopted in 1868, provided that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Thus the law of the soil, inherited from Great Britain, is plainly stated in the constitution of the United States.

II. RELATION OF THE STATUS OF CITIZENSHIP TO THE CONTENT OF CITIZENSHIP

1. *Judicial Definition of Citizenship*

Thus we have seen that natural-born citizens of the United States are persons born in the territorial dominion of the United States — born in the United States and subject to the jurisdiction thereof. This principle is derived from the English feudal law that a person is born a subject of the lord of the territory in which he is born. We have seen that on the continent of Europe natural-born citizens of the various countries are persons born to fathers who were citizens of those countries. This principle is derived from the Roman law and ultimately from the law of ancient city republics and from still more ancient tribal customs. Both in the United States and in Europe there were naturalized citizens. Naturalization here meant that aliens were admitted by taking the oaths of homage and fealty to the territorial lord. Naturalization there meant that aliens were adopted into the circle of kinship. But our fathers in convention assembled in Philadelphia did not mean to build up here a feudal organization of society. They were profound students of comparative government. They were familiar with classical learning. Therefore they adopted the term citizen from the ancient city republics as more appropriate to membership in a republic than the English term subject. In antiquity citizenship had meant the possession of the franchise and special privileges in a city republic. Did our fathers by the adoption of this word mean to imply that similar rights were conferred by citizenship, or was it simply a name of glorious republican association selected to convey a meaning developed in English law under the term subject? There was an uncertainty of the meaning of this new word, of its content. Attorney-General Bates said that eighty years had not sufficed to tell the precise content of the thing itself. Does the term citizen connote political privilege or civil or both? Even after the 14th Amendment had provided that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," it was still uncertain what these privileges and immunities were.

The question of whether or not the possession of citizenship implied the right of suffrage was answered by the United States Supreme Court in 1874 in the case of Minor v. Happersett,[12] Chief Justice Waite announcing the decision. Mrs. Minor claimed that she was a citizen and that the right of suffrage was one of the privileges or immunities of citizenship which a state could not abridge. But the court was able to show that in no state originally were all the citizens permitted to vote. In New Hampshire accordingly only taxpayers could vote, in Massachusetts property owners, in Rhode Island freemen of the company, in Connecticut possessors of certain moral qualifications and property, in New York freeholders and renters who paid taxes, in New Jersey property owners, in Pennsylvania taxpayers, in Delaware and Virginia those possessing the qualifications of the colonial franchise law, in Maryland, North Carolina, and South Carolina freeholders and taxpayers, and in Georgia taxpayers. The federal constitution does not confer the franchise on any one. The chief justice declared the laws on citizenship applied to both men and women. Therefore the following principle was established by this case, that the terms subject and citizen, one appropriate to the monarchical form of government and the other to the republican, signify merely membership in the nation, and thus the constitution of the United States does not secure to women the right of suffrage. The subsequently adopted 19th Amendment does not change this decision in principle, for citizenship does not imply suffrage and suffrage does not imply citizenship.

2. *Distinction Between Citizens and Nationals*

While citizenship does not imply suffrage it does imply a privileged status — rights and duties. In colonial times and after the adoption of the American constitutions there were classes within the territory of the United States who could not be recognized as possessing this privileged status — Indians and slaves — and therefore they were excepted. After the Spanish-American war when millions of inhabitants of the newly acquired territories were added to the sovereignty of the United States and when there was no immediate intention of incorporating such dependencies as parts of the United States or imposing all the rights and duties of citizenship in the United States upon their people, it was necessary to invent a new term to apply to the new facts. Then it was that Professor Moore in his work on International Arbitration suggested the distinction between citizens and nationals. F. R. Coudert in a magazine article made the same suggestion — possibly his was the first.[13] More recently the term nationals was used in the treaty of Versailles and is frequently employed in the intercourse between nations. It applies to all who are subject to a particular nation while the term citizens may have, as with us, a narrower meaning. Thus the citizens of the Philippine Islands are nationals but not citizens of the United States, yet the citizens of Pennsylvania are both nationals and citizens of the United States.[14]

3. *Distinction Between Federal and State Citizenship*

When the federal constitution was adopted a new kind of government was invented — a superstate with member states still sovereign. It was not like the League of Nations which in spite of barking dogs is no superstate. In the League of Nations the Council may propose a statute and the Assembly may adopt it by unanimous vote, but it only becomes operative among those member states which ratify it. But the United States was a superstate. There were citizens of the states and citizens of the United States — the same persons citizens of both. The citizens of the original states became citizens of the United States. Which citizenship was primary? In case of conflict between a member state and the superstate which citizenship was fundamental? To which sovereign did a citizen owe supreme allegiance? The language was as plain as words could make it, but the idea was new, and interests were in conflict. Good men were equally convinced on both sides of the question. A civil war and the adoption of the 14th Amendment settled the question, making the federal citizenship fundamental. Now a person is a citizen of the United States because born or naturalized in the jurisdiction. He is a citizen of a state because a citizen of the United States residing there.

III. The Rights and Duties of Citizens

1. *The Place of Rights in American Citizenship*

In the first part of this chapter we saw that citizenship in this country is conferred in accordance with a legal doctrine inherited from feudal England, namely, the law of the soil. In the second part we saw that the question of the content of citizenship was closely connected with the application of this law of the soil. If it was unwise to bestow certain rights on certain classes then an exception was made to the law of the soil. In successive chapters we will consider the status of certain classes, regarded as exceptional or abnormal. It will be necessary to consider the privileges and immunities of such classes. Now the purpose is to make some general observations on the rights and duties of citizens, first, as to the place of rights in American citizenship.

Englishmen and Americans have always stressed their privileges and immunities. Great documents like Magna Charta, the Petition of Right, and the Bill of Rights have marked successive steps in the progressive attainment of guaranties. We have bills of rights in our state constitutions, and the bill of rights in the federal constitution is of the greatest importance in the perpetuation of Anglo-Saxon liberties. Indeed, there has been an over emphasis on rights. Some of them should be modified or abolished. Yet the tendency in this democratic age is to enlarge the range of rights. The new constitution of the German Reich illustrates this tendency. "Every German shall have the opportunity to earn his living by economic labor."[15] The constitution guarantees "to insure to every German a healthful dwelling and . . . homestead corresponding to his needs."[16] Under the head of public instruction we find the constitution "guaranteeing to every individual a maximum of development to the end that he may cooperate in the most effective fashion in the well-being of the community."[17] No opinion as to these particular grants need be expressed, though the writer, frankly, thinks one of them, at least, to be chimerical, but they illustrate the strong tendency of the new constitutions of Europe to broaden the field of rights. The same world movement will affect us.

2. *The Place of Duties in American Citizenship*

A more startling innovation of the new German constitution is its emphasis on duties of citizenship. Here are some examples. "Every German has, without prejudice to his personal liberty, the moral duty so to use his intellectual and physical powers as is demanded by the welfare of the community."[18] The individual must place his property at the service of the community, for "property rights imply property duties."[19] "The physical, mental, and moral education of their offspring is the highest duty . . . of parents."[20] Duties are also emphasized in other new constitutions of Europe.[21] To bills of rights in American constitutions is it not time to add bills of duties? The privilege against self-incrimination might well be stricken from the one and the duty inscribed upon the other of a witness to tell the whole truth, even though the truth slay him. But if the reader cannot surrender this old English superstition he sees the distinct gain in putting rights in a constitution and publishing them to the world as a creed that fires the imagination and gladdens the heart, but a creed to have a worthy mission must prescribe duties that command the assent of the mind and impel the will to action. That cause is most loved that asks the greatest sacrifice.

3. *The Completed Cycle of Blood, Land, Allegiance, and Protection*

The continental law of blood was derived from tribal custom and the law of city republics. The English law of the soil was derived from territorial sovereignty. Nevertheless, the English developed a sense of nationality — kinship written large — that gave them a common law, a common language, a full-orbed literature and culture such as the world had not seen before on so large a scale. England sent her men of faith and enterprise and vigor to this country, so that the matrix of our nationality is English. Other countries sent, for the most part, their best, and the blending has made a new people. We are becoming one blood, one nation. But it is necessary now, as in the early days of Pennsylvania, to restrict immigration. It is more necessary to find a substitute for the old-time plagues, famines, and frosts which protected society from the defective, the unfit, and the criminal. Let science and human kindness seek a solution. Thus may society be protected from pollution.[22] We must revive the conception of kinship and keep our household clean.

The English retained the law of the soil which was once common throughout Europe during the feudal period.

There is a sense in which the people of a city, county, or country acquire a common likeness irrespective of actual blood relationship. Our ideas, opinions, habits, and morals are borrowed from our neighbors. Everybody sloughs off upon everybody else his physical diseases and his mental ailments. Therefore the call of good citizenship is to live a clean, vigorous life, and help make civic righteousness contagious. We must support the church and every agency that gives civilization a lift, and in a wholesome way makes citizens neighbors in a common land.[23]

Another product of feudalism was the law of allegiance. The anarchy, brutality, and ugliness of feudalism were neutralized and made almost beautiful by the chivalry of the warrior class and by the passionate allegiance to leaders which acted as the cement of society. The American citizen is called to an allegiance not inferior to that of a Scottish clansman dying for his chief, or to that of a Dante yearning for his native Florence. Our allegiance is to a land and a people, to a memory and a hope.

The reverse side of allegiance is protection. When an American goes abroad on a legal errand, he should know that a hundred million are back of him to give him and his property protection. When he is at home he should know that it is the will of a hundred million that he be protected in his life, liberty, and property. To this end it is necessary that the will of the people expressed in law be obeyed no matter what an individual citizen may think of a particular law, for otherwise there is no law and no government, but anarchy and death of the nation.

[1] Vinogradoff, P., *Historical Jurisprudence*, Vol. I, p. 212.

[2] *Ibid.*, pp. 232 ff.

[3] Morey, W. C., *Outlines of Roman Law*, p. 7.

[4] Vinogradoff, P., *op. cit.*, pp. 344 ff. Muirhead, J., *Historical Introduction to the Private Law of Rome*, pp. 6 ff.

[5] Vinogradoff, P., *Historical Jurisprudence*, Vol. II, pp. 102 ff. Sohm, R., *The Institutes of Roman Law*, pp. 34 ff.

[6] Ramsay, W. M., *St. Paul the Traveller and the Roman Citizen*, pp. 29 ff.

[7] Blackstone, W., *Commentaries on the Law of England*, Book I, p. 365.

[8] *Ibid.*, p. 373.

[9] Russell, E. B., *The Review of American Colonial Legislation by the King in Council*, pp. 168–170.

[10] Proud, R., *History of Pennsylvania*, Vol. I, p. 103. Bolles, A. S., *Pennsylvania*, Vol. II, pp. 134 ff.

[11] Article II, Sec. 1.

[12] 21 Wall. 162 (1874).

[13] Coudert, F. R., *Certainty and Justice*, p. 136.

[14] Wilson and Tucker, *International Law*, p. 130.

[15] Brunet, R., *The New German Constitution*, Appendix, Art. 163.

[16] *Ibid.*, Art. 155.

[17] *Ibid.*, p. 227.

[18] *Ibid.*, Art. 163.

[19] *Ibid.*, Art. 153.

[20] *Ibid.*, Art. 120.

[21] Constitution of Czechoslovakia, Art. 127.

[22] Says Mr. Justice Holmes in Buck v. Bell, 274 U. S. 200, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."

[23] Noble, John, as reported by Donald Messenger in the *Wichita Eagle Sunday Magazine.*

CHAPTER II

THE STATUS OF NEGROES

1. *Modification of the Common Law to Meet Conditions in America*

The introductory chapter was intended as an epitome of the book. In it we saw that natural-born citizens are such, in the vast majority of cases, by the operation of *jus soli,* for we left uncertain the adoption of *jus sanguinis* in America, reserving the discussion of that question for a later chapter. We saw that this status is prized by reason of the privileges and immunities attached to it, but all persons, until they are measurably equipped for the exercise of such privileges, may not safely be entrusted with them. Therefore in successive chapters we will deal with various classes of persons and the effort to fit the law to their changing conditions. We will study the law of persons. It will be abnormal law, ever tending to become normal law, but seldom reaching the goal, when the classification is based on age, sex, and even race, for the differences are essential, at least in some degree. We have seen that the status of citizenship may be attained by naturalization. A series of chapters will develop the subject. Every question of the status of citizenship is of lively interest because the content of citizenship is a matter of present, permanent, paramount importance. In the second part of our study, we will, therefore, turn from abnormal law to normal, from the law of persons to fundamental rights.

In this chapter and in others following we are concerned with exceptions to the application of the law of the soil. It was a strong temptation to treat of the Indians as the first exception, but as they were recognized as owing allegiance primarily to their tribes and were brought into our citizen body from time to time by treaties and acts of naturalization, we will postpone our study of this strangely fascinating subject till we find a place for it under the general head of naturalization. The next class of people who were given exceptional treatment was the negroes. They were not outside of our political and economic organization, but so very much within it that it was over them that our great constitutional and economic struggles were waged, and they give us to-day our outstanding race problem.

2. *The Legal Status of Negroes Before the Dred Scott Decision*

We are concerned then with a race that was developed under the vertical rays of the tropical sun, and brought to this country through the terrors of the middle passage against the immigrants' will. The pathos of their condition was eased by song and laughter, and a fecundity, not possessed by the Indians, made eventually the negroes thirty times as numerous as the aborigines are or ever have been.

As early as 1502 there were a few African slaves already in the Spanish West Indies.[1] The English and many other maritime peoples, including New Englanders and other Colonials, were engaged in the slave trade, bringing negroes to the sugar islands. In 1619 wrote John Rolfe of Virginia, "About the last of August came in a Dutch man of warre that sold us twenty negars." [2] Yet in thirty years there were but three hundred slaves in Virginia.[3] Slavery nevertheless was introduced into all the provinces; even William Penn was a slaveholder. The great friend and protector of the negroes, George Whitefield,[4] saw the introduction of slavery into Georgia an economic necessity. Not all the slaves were negroes, for Indians of the Carolinas and West Indies were sold in Massachusetts and Pennsylvania, and the New England Pequods were sold in the West Indies. It is estimated that three hundred thousand negroes were imported into the colonies before the Revolution.

What was the legal status of these slaves, whether negro or Indian? In England villeinage had disappeared a hundred and fifty years before slavery was introduced in the English colonies, and villeinage was attachment to the soil or to the person of the lord, and in either case was not slavery. While the custom of colonial merchants, who sometimes brought their slaves to ports in England and temporarily held them there, was given some recognition as late as the reign of Charles II, by the time of Blackstone it was said that the law of England abhors and will not endure the existence of slavery.[5] Yet strangely enough he concedes that possibly masters may be entitled to the perpetual service of their former slaves as a kind of prolonged apprenticeship. But in 1772 Lord Mansfield decided in the Sommersett case that, "The state of slavery . . . is so odious that nothing can be suffered to support it, but positive law."[6]

The Virginia charter of 1609 had stipulated that the statutes, ordinances, and proceedings of the colonial government should be, "as near as conveniently may be, agreeable to the laws, statutes, government, and policy" of England.[7] In theory the common law of England was the common law of Virginia, subject to changes made to fit conditions in the colony. There was a crying need for labor. The original planters themselves were virtually servants of the company for a term of years. They sent a petition to the crown in 1618 that vagabonds and condemned men be sent out as slaves.[8] Political prisoners in considerable numbers were sent as indentured servants. They were Scotch and Irish and with them came English apprentices too poor to pay for their transportation and so bound out for a term of years. The legal status of the negroes at first was that of indentured servants for a term of years. Some of them were actually freed at the end of their terms. In the records the negroes appear as servants, not slaves.[9] The greater number almost insensibly passed over into the status of slaves. A new custom was introduced which became the common law of Virginia on slavery. Not till 1661 did a statute recognize the existence of slavery. In 1662 a law declared that a child should follow the condition of the mother.[10] This was a repudiation of the English common law rule and the adoption of the rule followed by the Spaniards. At a later time slaves were declared to be real estate, and so subject to the law of entail, though the law still gave them many characteristics of personal property. By the law of 1670 Christian slaves were declared to be indentured servants, but such a law would operate to retard their evangelization; therefore by act of 1682 slaves, becoming Christians, did not change their status. Though the increase of slavery in the early years was slow, it became so great that the terror of the whites of Jamaica was communicated to the people of the southern colonies. "From 1726 until the Revolution almost every session of the Virginia Assembly debated the question of the restriction of the slave trade."[11] Yet the king issued instruction to the governor "upon pain of the highest displeasure, to assent to no law by which the importation of slaves should be in any respect prohibited or obstructed."[12] The law went through a similar development in all the colonies, and though the greater number of slaves were in the southern, there was a similar revulsion of feeling in all.

The cause of this revulsion of feeling was not so much the dread of a slave insurrection, as the humanitarianism that was born of the Great Awakening — an intercolonial religious revival which from 1740 to the present day has had a remarkable influence on American ideals and institutions — and that was brought to maturity and action by the adoption of French political philosophy.[13] The immediate effect of the Great Awakening was to arouse a fraternal interest in the unfortunate and oppressed. A negro school was established in Philadelphia, and Nazareth was dedicated by Whitefield primarily as a refuge for free negroes. The denominations that were active in the revival soon turned strongly against slavery, notably the Congregationalists under the leadership of Hopkins, the Methodists, the New Side Presbyterians, and Baptists, together with the Quakers who from their first coming to America had denounced the institution.[14] The eighteenth century philosophy brought the French Revolution and our own as well. Again there was the exaltation of liberty. Pennsylvania in 1780 passed an act for the gradual abolition of slavery.[15] The law provided that all persons born in the state after the passage of the act were to be free, and all slaves not registered at a certain time were to be emancipated. Massachusetts, one day later than the passage of this act, adopted its famous constitution which is nominally still in force. In its bill of rights is the declaration that all men are born free and equal, and have an inalienable right to liberty. This provision was interpreted by the state courts as abolishing slavery. New Hampshire followed Massachusetts, but the other northern states with Vermont followed Pennsylvania in providing for gradual abolition. Congress, under the articles, unanimously passed the Ordinance of 1787 prohibiting slavery in the Northwest Territory. Jefferson narrowly missed persuading Virginia to abolish slavery. "I tremble for my country," he said, "when I reflect that God is just, and that his justice cannot sleep forever."

Although the Ordinance of 1787 was passed by the action of all the states and by vote of all the members of the Continental Congress but one, a northerner, the two far-southern states strongly opposed the prohibition of the importation of slaves.[16] A compromise was effected at Philadelphia in the constitutional convention, resulting in the adoption of Article I, Section 9: "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importations, not exceeding ten dollars for each person." Compromise was also made on the representation of slaves, as provided in Article 1, Section 2: "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which may be determined by adding to the whole number of free persons, including those bound to service for a term of years, and, excluding Indians not taxed, three fifths of all other persons." A concession of the free states to the slave states was made in Article IV, Section 2: "No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due."

Under the earnest advocacy of President Jefferson Congress passed the act, authorized by the constitution, which prohibited the slave trade from the first day of the year 1808, yet there was an illicit slave trade in which thousands were smuggled into some of the states, continuing in some degree right up to 1860. The Revolution stimulated the process of manumission until there were so many free negroes as early as 1800 that their presence was felt to be a menace, not only in the slave states but in the free states as well. There was a reaction both south and north from the idealism of the war period. There was a phenomenal demand for cotton in England resulting from the adoption of the new industrialism and from Eli Whitney's invention of the cotton gin for cleaning cotton. Now cotton became king and the price of slaves soared. Philosophers like Dew of Virginia arose to defend the system of slavery, and statesmen like Calhoun, to formulate its political policy. Radicalism, the policy of a small minority of the North, became offensive. Reaction crushed freedom of speech in the South. A small slave-holding oligarchy controlled the southern states, and absolutely dictated the policy of the Democratic party. The slave interest controlled the presidency and the senate, but finally lost the lower house. The party of reaction also controlled the Supreme Court, and now came the opportunity to settle the slave question. In this country the courts have been permitted to assume a power, declared by Blackstone to be subversive of all government, to nullify the acts of a coordinate body. We have venerated the courts almost to the point of worship.

3. *The Dred Scott Case and War*

The constitution provides that suits between citizens of different states may be instituted in a federal court. It also provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Dred Scott[17] claimed to be a freeman and citizen of Missouri, and therefore to have the right to sue Sanford, a citizen of New York. Sanford, the purchaser of Scott, replied that Scott, even if he were not a slave, was a negro, and because a negro was not a citizen of the state in the sense of the federal constitution. Justice Nelson had been originally appointed to write the opinion of the court, but he ignored all contentions not necessary to reach a decision of the case, observing the proper judicial rule, but this did not meet the approval of the chief justice. Taney stands second in the list of great chief justices. Maryland is justly proud of him. He patriotically desired that the political debate which was agitating the country might be decided. He was fully convinced of the prestige of the court, of the respect which Americans give to their judges. He was strong in his belief in property rights, states' rights, slavery's rights. The country was in breathless expectation. The administration had urged the people to await the solution which the Supreme Court would find. Therefore Taney wrote a political opinion which is the most famous in the annals of the court. He held (1) that Dred Scott was not a citizen in the sense of the federal constitution because a negro, for negroes were brought here as slaves and not as part of the political community. (2) Neither was Scott a free negro, because the law prohibiting slavery in a territory of the United States was unconstitutional. The Missouri compromise was thus nullified, and the territories were thrown wide open to slavery. (3) Neither did the residence of Scott in Illinois make him a freeman after his return to Missouri, for his status in Missouri was determined by Missouri law. By that law he was a slave.

The dissenting opinion of Justice Curtis challenged every point made by the chief justice. Curtis was one of the most brilliant lawyers of the country, appointed from Massachusetts, and one of the two dissenting justices — two against seven. He tore the argument of Taney to shreds, and the bitterness between the two men became so intense that Curtis resigned from the bench, while the unpopularity of Taney's decision was a cloud upon all the remaining days of the chief justice. Curtis showed (1) that negroes, the descendants of ancestors brought here as slaves, could become citizens of a state and of the United States. In fact at the time of the adoption of the federal constitution free negroes were not only citizens, but citizens exercising the right of suffrage, in five states, and were voters in them still except where, as in North Carolina and New Jersey, the suffrage had been subsequently taken from them. (2) He showed that the territory west of the Mississippi and north of Missouri and of the southern line of Kansas, dedicated to freedom by the Missouri Compromise Act, was in the same legal position as the territory dedicated to freedom by the Ordinance of 1787, which was reenacted by Congress after the adoption of the federal constitution. The act was constitutional. (3) He also declared that Missouri law could not restore the status of slavery to Scott, who had been taken by his former master to reside at Fort Snelling, Minnesota, for such attempted restoration would be a nullification of a law of Congress, the supreme law of the land.

The constitutional results of the Dred Scott decision were that Congress could not admit negroes to federal citizenship or the states to state citizenship in the sense of the federal constitution; and that Congress could not bar slavery from a territory and the people of the territory could not, till it became a state. The political results immediately were that the slaveholders and Douglas Democrats were in high glee, distributing thousands of copies of the opinion of Taney. The Freesoilers did the same with the opinion of Curtis. The responsibility passed to the nation and soon the nation was at war.[18] Had the court restrained itself to the exercise of its proper functions and issued a colorless decision, such as Nelson prepared, the war would have been postponed and might have been avoided altogether.

President Lincoln issued the proclamation of emancipation by virtue of his power as commander in chief and as a necessary war measure to suppress the rebellion. Among the powers of a commander in chief in occupation of conquered territory is to free the slaves of the inhabitants, but slave territory already occupied was excepted from the operation of the proclamation, while territory not occupied was to come under its operation. It was the announcement of a policy and not the statement of an accomplished fact. Yet by its appeal to the moral sense of mankind it powerfully aided the union cause. It made impossible foreign intervention in the interest of the Confederacy.

The unsatisfactory legal basis of the emancipation proclamation of September 22, 1862, and January 1, 1863, as an exercise of war power, and the doubt as to whom it applied, demonstrated the need of a constitutional amendment prohibiting slavery and involuntary servitude. Yet this proposal was criticized as changing the federal form of the union. Nevertheless the amendment passed both houses, attended with no little jubilation, and was submitted to the states. The Thirteenth Amendment was rejected by Kentucky and Delaware, still slave states, but ratified by the other loyal states, and by a sufficient number of the reconstructed states, and was proclaimed December 8, 1865, as a part of the constitution.

The legislatures of the reconstructed states which ratified the amendment passed legislation not in harmony with its spirit, apprenticeship laws, vagrancy laws, even peonage laws, restricting the work of freedmen to that of hired laborers, bound to their masters. The old patriarchal feeling was lost. The negroes had neither the former protection of slaves nor the rights of freemen. This action was dictated, no doubt, by fear, which has always possessed the ruling class in the presence of a numerous, sometimes preponderant, subject population.

The answer of Congress to these black codes was the passage of the Civil Rights Act of 1866 with the following provision: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."[19]

Though the constitutionality of this act was upheld by a federal circuit court,[20] the precedent of the Dred Scott case was against it. Therefore it was advisable to reverse that decision by the adoption of another amendment, assuring the citizenship and fundamental rights of the freedmen. This was the avowed purpose of Thaddeus Stevens of Pennsylvania, leader of the house, and of Senator Howard of Michigan, the fathers of the Fourteenth Amendment. Therefore the first section of the 14th Amendment — "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"— was designed to guarantee substantially the rights enumerated in the Civil

Rights Act of 1866 and together with other provisions of the amendment to authorize the passage of such an act. The act was repassed after the ratification of the amendment.

All honor to this last service of Thaddeus Stevens in the interest of negroes. But another part of the amendment is a stain upon his name and the party which he led. No wonder the southern states refused to ratify. Now it was declared by Congress in its Reconstruction Act that no state governments existed in the South. It refused to receive the recently elected senators and representatives. Over the president's veto it set up military governments in the South. New constitutional conventions were to be called. Negroes were to be eligible both as voters and delegates, but the disfranchised whites, who had previously taken oath to the United States and afterwards rebelled, were not eligible as voters or delegates. In some states the majority of the delegates were negroes and carpet-baggers. It was by such methods as these, that conventions were held, constitutions ratified, legislatures elected, and the 14th Amendment adopted, which was proclaimed July 28, 1868.

Suffrage had been given the negroes of the South, and the state governments which they and their carpet-bag friends had set up were sustained by federal troops, but a system of this kind could not be permanent. The counter-revolution was simply delayed in its ultimate triumph in the South. There were signs of reaction in the North. Therefore if negro suffrage was to be perpetuated, it was necessary quickly to put it beyond reach of change in the national constitution. There were arguments of the statesman and idealist for such action, for a separate class of people, long oppressed, requires the suffrage for its protection. Our revolutionary ancestors set up the claim of no taxation without representation. There were arguments of the practical politician, even if they were not acknowledged. A suffrage amendment was necessary to keep the hold of the dominant party on the South. Many advocated securing the suffrage to all male negroes of age, but Massachusetts had a law disqualifying illiterate voters. Such a measure would therefore not be acceptable in the North. Accordingly a happy solution was found in the negative provision that, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." The permanent provisions of recent southern constitutions are quite in harmony with this amendment, though temporary provisions have sometimes been found unconstitutional.

4. *Reaction and the Slaughter House Cases*

The carpet-baggers were installed in the executive offices and the negroes in the legislative halls. There the negroes quickly became expert parliamentarians. They knew the points of order and were adepts at filibustering methods. The state treasuries were at the mercy of a race whose chief vice in slavery days was theft. "No storming force ever made quicker work of a captured city. Most of the carpet-baggers yielded to the current, and took a share of the spoils. The impoverished treasuries were instantly swept clean." Debts mounted. The tax payers were still whites. In states with a large white population, like Virginia, the whites took gentler, though no less irregular, methods to obtain control than were necessary in states, like South Carolina, with an overwhelming negro population. At the same time there was a reaction at the North. The people were disgusted with corruption and plunder, and a prolonged interference with the domestic affairs of sister states. A state of war could not be continued permanently. There was a desire to return to normal conditions.

This reaction in public opinion which finally resulted in President Hayes withdrawing the troops from the South and permitting the intelligent classes to resume the direction of public affairs, was early illustrated by the decision in the Slaughter House Cases,[21] made in 1873. This decision is of great importance in our constitutional history in that it put a different interpretation upon the first section of the

14th Amendment from the well-known purposes of the framers of the amendment. This decision is a good illustration of constitutional amendment by judicial interpretation. As a result of it the clause in the first section on privileges and immunities was practically erased from the document. Professor Corwin calls this decision the greatest *tour de force* in its history. It was the most arbitrary decision which the court has ever made, yet it was ratified by public opinion. It had been the announced intention of the framers of the amendment to put the whole range of rights under the protection of Congress, but the court by distinguishing rights which inhere in federal citizenship from rights which inhere in state citizenship, left the competency of Congress practically where it was before and restored to the states a power which it had been the purpose of the amendment to make subordinate. Justice Field in his dissenting opinion said the majority of the court had made the privileges and immunities clause of the amendment "a vain and idle enactment."

5. *The Procedural Rights of Negroes*

While negroes were not parties to the litigation involved in the Slaughter House Cases, the decision did deny powers to Congress which had been bestowed for the special protection of the freedmen. Nevertheless the amendment and legislation enacted under it did protect the negroes in certain procedural rights. It was decided in Strauder v. West Virginia [22] in 1879 that negroes, charged with crime, were entitled to be tried by juries from which members of their race had not been excluded because of their race. It was decided in Ex parte Virginia [23] in the same year that a state judge who refused to summon any citizen as a juror on account of race, color, or previous condition of servitude, was guilty of a misdemeanor, and the act of Congress, so providing, was not unconstitutional, as the selection of jurors was not strictly a judicial function but a ministerial function. Yet the judge was acting in the name of the state; his act was the act of the state, and came under the condemnation of the amendment.

6. *The Social Rights of Negroes*

As an act of defiance the retreating army of Republican idealists and radicals passed the Civil Rights Act of 1875. Its main purpose was to give negroes equal privileges on public conveyances, at hotels, and at places of amusement. It aimed to give the negroes equal social rights, not merely essential civil rights, the denial of which would be a badge of slavery. The act was to operate directly against the persons who withheld such social privileges from the freedmen. The court in the Civil Rights Cases,[24] decided in 1883, held the law unconstitutional on the ground that "individual invasion of individual rights is not the subject-matter of the [14th] Amendment." Congress was restricted to legislation directed not against individuals but against states. The doctrine of the Slaughter House Cases was thus employed to declare unconstitutional an act of Congress, and that doctrine we have seen was not based on the actual intentions of the framers of the amendment but on the judicial finding of those intentions. Although it had been the intention of the framers to give Congress full power to protect negroes in the whole range of rights, here a law which would be entirely within the competency of a state legislature, was declared to be beyond the competency of Congress. Surely a negro, decently clothed and conducting himself in an inoffensive manner, ought to have a legal right to a seat in any section of a place of amusement for which he offers to pay, or precisely the same right that is accorded a white man. A degree of segregation may be mutually desirable in theatres and other places of amusement, but the facilities offered should be absolutely equal and without taint of inferiority or discrimination.

7. *Segregation in Transportation, Education, and City Blocks*

The Louisiana constitution of 1868, adopted under carpet-bag domination, provided that, "all persons shall enjoy equal rights and privileges upon any conveyance of a public character." An act of 1869 applied the principle of this article to steamboats. A person of color was refused accommodations in the cabin, specially set apart for white persons, of a Mississippi River steamboat engaged in interstate commerce. Chief Justice Waite said: "No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate."[25] He held that this statute was a regulation of interstate commerce not within the power of the state. "If the public good require such legislation, it must come from Congress, and not from the states."

Yet when a southern state passed a law making the exactly opposite regulations, but applicable to railway conveyances, the law was sustained by the United States Supreme Court as a legitimate state police regulation. Professor Freund puts the argument in the following words: "Transportation companies may be subjected to public control in the interests of public convenience and comfort, and if separate accommodation is generally demanded, and not unreasonably burdensome, it may be compelled by law. It then follows also that the failure to provide it or the failure to maintain it on the part of the railroad company, may be visited with penalties, and a passenger who intrudes himself into a compartment in which he is not wanted may likewise be punished."[26] In the case of Plessy v. Ferguson the court said: "A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."[27]

The two races, though segregated on railway trains by the laws of some states, are entitled to absolute equality of treatment. When they pay for first-class tickets they are entitled to first-class accommodations. When there are not enough of one race to support the maintenance of a special service, such as sleeping car or parlor car, the carrier may not deny to individuals of that race such service. It is refreshing to read of a group of up-standing colored delegates to the National Conference of Social Work going to Memphis, Tenn., from Cincinnati in a Pullman and surprising the white red caps when the colored passengers appeared to claim their baggage.[28]

Segregation in schools is generally required in the southern states and is frequently practised in northern. It has been sustained in both federal and state courts with the condition that there be equality of privileges. Where there are laws prohibiting intermarriage it is consistent with their policy that separate education be required both in public and private institutions. It is in the interest of discipline and the moral progress of both races that they be kept separate in the period of adolescence. Only by the adoption of segregation in education may well-trained colored teachers in any proportionate number find public employment.

Segregation in city blocks is a matter of vital interest to society. A degree of segregation is enforced already by custom, sometimes enforced by race riots. But the effort to express the unstable custom in law with full recognition of the needs of both races and a full protection of vested rights has unfortunately so far been defeated by the courts, as in the case of Buchanan v. Warley.[29] The reason for the decision cannot be detected from the recited platitudes, but it may have been the fear of still more congested black belts in our cities. Does not society owe to its negro citizenry, that, as wards of the state, the colored people shall be so housed as to contribute to their welfare, their content, and their pride? Whole blocks here and there should be purchased by a public corporation, created for the purpose, and the houses constructed or reconstructed, and made habitable and attractive, then sold to colored purchasers on the installment plan, the corporation retaining a measure of control for the advantage of all.

Indians are Indians, and negroes are negroes, and whites are whites. There are differences far deeper than the skin, but there is no inferiority and no superiority. Races have not the same heredity, and mere repeal of unjust discriminations does not equip all for a fair and equal contest. But in spite of disadvantages men and women of color in every field of effort have achieved remarkable success. Many thousands may recount with manly satisfaction and with thanksgiving to God what they have accomplished. Still there is a debt of society to all our citizens of color, not yet paid.

[1] Weatherford, W. D., *The Negro from Africa to America*, pp. 76, 93.

[2] West, G. M., *The Status of the Negro in Virginia*, p. 1.

[3] Collins, W. H., *The Domestic Slave Trade in the United States*, p. 4.

[4] Maxson, C. H., *The Great Awakening in the Middle Colonies*, pp. 57, 58, 148.

[5] Blackstone, W., *Commentaries*, Book I, p. 424.

[6] *Ibid.*, p. 425, Note.

[7] Charter of 1609 in Thorpe, *Constitutions*, Vol. VII, p. 3801.

[8] Weatherford, W. D., *op. cit.*, p. 116.

[9] *Ibid.*, pp. 169, 170.

[10] Lalor's *Cyclopedia*, Vol. III, pp. 725, 726.

[11] Weatherford, W. D. *op. cit.*, p. 123.

[12] *Ibid.*, p. 123.

[13] *Ibid.*, p. 125.

[14] Maxson, C. H., *The Great Awakening*, pp. 148, 149.

[15] Lalor's *Cyclopedia*, Vol. I., p. 2.

[16] Weatherford, W. D., *op. cit.*, p. 126.

[17] Dred Scott v. Sanford, 19 How. 393.

[18] Burgess, J. W., *Middle Period*, p. 458.

[19] Burgess, J. W., *Reconstruction and the Constitution*, pp. 68, 69.

[20] United States v. Rhodes, 1 Abbott U. S. 28 (1866).

[21] 16 Wall. 36.

[22] 100 U. S. 303.

[23] 100 U. S. 339.

[24] 109 U. S. 3.

[25] Hall v. De Cuir, 95 U. S. 485 (1877).

[26] Freund, E., *Police Power*, p. 719.

[27] 163 U. S. 537.

[28] Philadelphia *Tribune*, June 7, 1928, Article by Wayne L. Hopkins.

[29] 245 U. S. 60.

CHAPTER III

ORIENTALS BORN IN THE UNITED STATES

1. *The Problem of the Negro Followed by the Problem of the Oriental*

In tracing the stages through which negroes have advanced both in status as to citizenship and as to special protective legislation, we have found no little satisfaction in the fact that the race has been admitted to full citizenship, and yet under the police power it is possible to give negroes the special paternal aid which their differences from the whites indicate as essential to their progress. Had the strict historical order been followed and we had first studied the problem of the Indians, the aboriginal occupiers of the soil, we would have come to the same conclusions as to them. The constitutional protections set up primarily in aid of the negroes became also timely aid to another sorely oppressed class of persons, corporations.[1] Our study of corporations as partial citizens will follow that of full citizens, but had we taken them in the historical order we would have come also to the startling conclusion that corporations ought to have the status of citizens and yet should be wards of the state and nation, because of their great social utility and their correspondingly great social potentiality for evil. The problem of the oriental in the United States became acute at a still later period, and the same constitutional protections, though not exclusively, have been claimed by this new racial element of our population. Here we are concerned with peoples of a far older civilization than our own, and though the laboring classes from the far-eastern lands are law-abiding, thrifty, and clever, probably surpassing our own people in these excellent traits, their essential racial difference is unquestioned. Is the racial difference from the whites so fundamental as to assign the oriental to a separate class, such as was formerly assigned to the American Indian, with the result that children of orientals would not be deemed citizens, though born in the United States? Would the policy of the country expressed in its laws upon naturalization aid in the interpretation of the concept natural-born citizen when applying the law of the soil? Would the possible introduction of a large unassimilable laboring class expose the country to economic and racial struggles dangerous to our democratic institutions? Ought special protection to be thrown about orientals, legally in the country, and their children, born here? Does the honor and safety of the country also require such protective legislation? These are the phases of the problem of the oriental to be considered in this chapter, though some answers may be more fully given in later chapters.

2. *Persons Born in the United States, Not Subject to the Jurisdiction Thereof, and Not Citizens*

International law recognizes certain classes of persons as not citizens of the country of their birth because not subject to its jurisdiction. American law at a very early period made still further exceptions to the operation of the law of the soil, also resorting to the legal fiction of absence of jurisdiction. In the decision of the Slaughter House cases [2] Mr. Justice Miller refers to these exceptional classes, evidently thinking primarily of those recognized by International Law, when he says, speaking of the 14th Amendment, "The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States." If this were a correct exposition of the 14th Amendment, children of orientals born in the United States would not be citizens. But Willoughby says that this interpretation was mere dictum and "incorrect dictum as far as regards persons born within the United States of parents who are aliens." [3] And Dean Hall of the University of Chicago Law School goes further, saying, "This exemption, however, does not apply to the children of consuls nor to other foreign agents whose duties are not diplomatic." According to him the following persons are excluded as not subject to the jurisdiction:[4] (1) Children of diplomatic representatives, (2) Children born on foreign public vessels, (3) Children of public enemies in hostile occupation of territory, and (4) Expatriated persons. To these he added a class created by American law, since repealed, (5) Tribal Indians. At a still earlier period there was another class excluded from citizenship by birth, (6) Children of slaves and, according to Chief Justice Taney, children of free negroes.[5] This law, if it was the law, was repealed by the 14th Amendment. This last exemption could not be based on the jurisdictional fiction, but on the more substantial reason of difference in race. If American common law or statute law has repeatedly modified the English common law to meet the actual facts of racial differences existing in this country, there was basis for the dictum of Justice Miller, but it failed to entrench itself as the law.

3. *Naturalization Permitted to Aliens Who Are Free Whites or Persons of African Descent*

By act of 1802 only free white persons were made capable of naturalization. By act of 1870 this provision for naturalization was extended to persons of African descent.[6] Under these acts naturalization was refused to Chinese, Japanese, Burmese, and American Indians, born in Canada. By act of 1882 there was the specific provision that no court should admit a Chinese to citizenship.[7] It was possible, it would seem, to extend the principle of this legislation, or, in other words, to interpret the policy of Congress as expressed in these laws, to the point of denying citizenship to children of orientals.

On the other hand, by act of 1900, providing a government for Hawaii, citizens of that republic were declared to be citizens of the United States.[8] Chinese citizens of Hawaii, together with native Hawaiians and persons of other nationalities, became American citizens. N. Faun, a Chinese, was admitted to Hawaiian citizenship in 1892 and was a citizen of the republic in 1898. In 1901 he applied for a passport as a citizen of the United States and received it.[9] Yet American citizens, residents of Hawaii, of oriental birth or ancestry, formerly were not even permitted to travel as visitors in continental United States. Now American citizens of oriental ancestry may enter "providing they hold special certificates authorized by the Department of Labor."[10] Thus we find that natural-born citizens of the United States, of oriental ancestry and Hawaiian residence, are denied certain rights possessed by other natural-born citizens of the United States. A distinction is made on basis of race.

4. *Chinese Children, Born in the United States, Whose Parents Owed Temporary Allegiance to the United States, are Natural-born Citizens*

Although the annexation of Hawaii involved as an incident the collective naturalization of Hawaiian citizens of oriental birth or ancestry, yet as immigration of Chinese laborers was prohibited or their naturalization by formal papers, and as those naturalized by annexation of the republic were given restricted rights, it would still be consistent with the policy and laws of Congress to deny to children of Chinese parents, born in continental United States, the status of natural-born citizens.

Such possible denial was judicially prohibited by the United States Supreme Court in the case of United States v. Wong Kim Ark[11] in 1898, the very year of the annexation of Hawaii. The single question for determination, the court affirmed, was "whether a child born in the United States of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States." The court quotes from Lord Coke that the jurisdiction over a resident alien was " strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject," and from an American essayist that a child of an alien " if born in the country, is as much a citizen as the natural-born child of a citizen." The court holds that the amendment " affirms the ancient and fundamental rule of citizenship by birth within the territory," with the qualifications as old as the rule and one additional qualification applying to children of tribal Indians. According to the opinion of Justice Gray birth and naturalization are the two sources of citizenship; the former is birth in the United States and the latter is by operation of law or treaty. The constitution governs the former, and Congress may regulate the latter. Congress may enlarge or abridge the rights of aliens to be naturalized, but no act of Congress can affect citizenship acquired as a birthright by virtue of the constitution itself. Wong Kim Ark was a citizen who upon returning from a temporary visit in China could not be denied admission to the United States.

The decision appeals to our sense of justice, but so also would a decision condemning naturalization laws that discriminate between persons on the basis of race. On the same principle our immigration laws could be judicially vetoed. But the protest would immediately ring out that every people exercise the right of determining whom they will admit as immigrants and citizens, and that the general principles laid down in the constitution were not meant to prohibit the exercise of these powers by the political departments of the government. The general principle of the law of the soil that status is determined by place of birth has always been subject to qualifications created by custom or legislation, and the statement of this general principle in the 14th Amendment, except as applied to negroes, was probably not intended to forestall the creation of future qualifications as the need should arise. The denial of power to Congress is therefore to be criticized, especially as that question was not before the court. The decision appears to deny the validity of action subsequently taken in restricting the rights of American citizens of oriental ancestry, resident in Hawaii. Furthermore it is amusing to read that children born abroad to American fathers are naturalized citizens.

5. *The Prohibition of Immigration of Chinese Coolie Laborers*

While the decision in the Wong Kim Ark case is criticized as unduly tying the hands of Congress, yet under the laws of Congress as they then stood it was possible either to find Ark a citizen or an alien. We approve the finding that he was a citizen, as more favorable to liberty and more consonant, in his case, with justice, since he desired to be declared a citizen. Chinese who legally came to this country and whose conduct was in accord with the conditions of their entry, certainly had a vested right in their residence, even though it was technically temporary and their allegiance to the United States was likewise temporary. In the opinion of the writer their children, born here, should have the same vested right, either as citizens or as resident aliens, according as Congress and the Chinese, born here, mutually determine. The Wong Kim Ark case decided, however, that they are citizens, whether they will it or not, and whether Congress wills it or not. But Congress was left the power to regulate immigration and naturalization.

The events which made regulation necessary must be reviewed. A. H. Smith,[12] a missionary, made a thorough investigation of the treatment accorded the Chinese laborers, and wrote a flaming indictment against the lawless elements that violated the legal rights of the Chinese and against the American people who failed to enforce the law and protect the Chinese. He claims that the coming of the Chinese was at our urgent invitation at the time of the discovery of gold in California and was due to the absolute necessity of cheaper labor. "They were invaluable in every capacity, as they always have been in each of the many lands to which they have migrated. The steamer companies in every way encouraged and facilitated emigration.

Without the Chinese the continental railways could not have been built. There was a gradual expansion of Chinese activities in all forms of useful service in towns and in settlements, but the Chinese also took up abandoned workings in mines and streams and made them pay. But race prejudice soon got upon their trail. Chinese testimony was not admissible in courts of law, leaving them a helpless prey to violence which was never lacking. A Chinese was taxed over and over again on the same mining property by armed and lawless men whom he had no power to resist. His legally acquired mining claims were raided, his dwellings destroyed, whole settlements broken up, and countless unprovoked and brutal murders committed not only in the hamlets and towns on the Pacific coast, but in the large cities as well." Smith gives numerous and distressing details of these outrages. The pioneer days of faraway California were doubtless picturesque, but sordid, and, in the treatment of the Chinese, cruel. As the movement of population redoubled from both directions the contact between Europe and Asia became more bitter. It was a race war growing out of economic struggle. Occidental labor concluded it could not compete with oriental labor, and must withdraw or drive the other out.

Governor Stephens' letter [13] of June 19, 1920, to the Secretary of State of the federal government says: "Forty years ago the California race problem was essentially a Chinese problem. At that time our Japanese population was negligible. The Chinese immigrants, however, were arriving in such numbers that the people of the entire Pacific slope became alarmed at a threatened inundation of our white civilization by this Oriental influx. Popular feeling developed to such a pitch that many unfortunate incidents occurred of grave wrong done to individual Chinese as the result of mob or other illegal violence. Our country became awakened at the growing danger, and Congress passed the Chinese Exclusion Act providing for the exclusion of all Chinese laborers and the registration of all Chinese at that time lawfully within the country." The Geary Exclusion

Act was passed in 1882.[14] From the census in 1880 to that of 1920 the reduction of Chinese population in the United States was from about 130,000 to 75,000. In the one state of California the reduction from the census of 1890 to that of 1920 was from 72,472 to 33,271. The testimony of the California Board of Control is as follows: " Because the Chinese have been residents in California for many years, dating back as far as the mining days of '49, it naturally follows that a very large part of the present Chinese residents of California are native-born Californians. Except for a few large agricultural corporations, the Chinese are generally engaged in small commercial enterprises supplying the needs of their own countrymen. Owing to the effectiveness of the Chinese Exclusion Act, the Chinese can not be considered a menace for the future." [15]

6. *The Immigration of Japanese Laborers*

The forced reduction of cheap Chinese coolie labor on the Pacific coast resulted in the stimulation of immigration from other Asiatic lands. The change of policy in Japan in 1885, permitting thereafter emigration, brought thousands to Hawaii and the United States. The increase was so marked after 1898 that California alone in 1919 had a Japanese population of 87,000, including about 5,000 American-born Japanese being educated in Japan.

According to the California Board of Control the oriental was of no appreciable value as a farm laborer to the American farmer. Probably there were more white laborers working for oriental farmers than there were oriental laborers working for American farmers.[16] Dr. Gulick notes incidents which seem clearly to indicate that organized labor felt no menace in Japanese labor.[17]

The Japanese immigrant laborers were said to occupy the status of laborers but a remarkably short time, and then in the employ of one of their own people, preferably of their own clan. They quickly graduated into lease holders and crop contractors, coming into direct competition with American farmers. If American farmers maintained their standards, as to dwellings, hours of labor, and Sunday rest, and did not employ their women and children in the fields, they were unable successfully to compete with the Japanese farmers. Already in 1920 Americans in some lines of farming had yielded to the Japanese ninety-five per cent of the business.[18]

In the fishing business in that same year in California there were more Japanese than any other nationality. The boats, used by them, were registered as Japanese-owned and were mortgaged to the canneries. This practise was claimed to be in violation of federal law, and would be especially dangerous in time of war.[19]

Speculators in land favored Japanese farmers, as they demanded less improvements than American farmers would require. Commission houses welcomed the Japanese and financed them through their banking connections, but presently the Japanese introduced their own cooperative banking and distributing agencies.[20]

The result of Japanese efficiency and success in many fields was the raising against them of insistent but not lawless opposition. This brought quicker results than the mad methods of the generation before.

7. *The Gentlemen's Agreement and the Picture Brides*

The opposition to the planting of another alien population in the Pacific coast states became active about the year 1900. The California Labor Commission investigated the employment of Japanese laborers, and made criticisms similar to those previously made against the Chinese. The federal Immigration Bureau investigated charges of violation of the contract labor law and showed that twelve emigrant companies had representatives in the United States. The governor of California began to call on Congress for the exclusion of not only Chinese but other Asiatic peoples. In 1907 President Roosevelt refused admission to Japanese laborers coming from Mexico, Canada, and Hawaii. In that year the Japanese government consented to the Gentlemen's Agreement[21] by which Japan was to issue in the future passports only to non-laborers or to laborers who were coming to the continental United States to resume a formerly acquired domicile or to join a parent, wife, or children residing here. It is claimed that the Japanese government acted in good faith in observing this agreement.

For a time at least the number of Japanese men departing from the United States exceeded the number admitted. But the number of women entering the country vastly increased, and a large proportion of these women, given passports as wives of Japanese in this country, were "picture brides,"[22] married in Japan by a ceremony which did not require the presence of the groom. The women after admission were really agricultural laborers and soon were mothers of rapidly increasing offspring. These picture brides had a fecundity far in excess of American women. There was the menace of a large Asiatic population enjoying every right of American citizenship.

This menace was envisioned by the California Board of Control in the following representation. "California bears in mind that there are now [1920] 21,611 Japanese minor children, born in California, all of whom will shortly become full-fledged voters, some already having acquired that right. To this number must be added approximately 5,000 American-born Japanese temporarily domiciled in Japan for educational purposes who are eligible to return here at any time and who will, upon reaching majority, exercise the right to vote. Besides must be counted those Japanese who are citizens of the Hawaiian Islands, and, therefore, American citizens, and who are coming to California in ever increasing numbers. Considering the preponderance of Japanese population in certain California localities, the results that will follow in the future from this voting privilege merit serious consideration."[23] The last of the picture brides came in 1924, when the Gentlemen's Agreement was brought to an end by the passage of the Immigration Act of that year which has given such serious offense to Japan.

8. *The School Question*

In 1905 the San Francisco Board of Education resolved to establish separate schools for Chinese and Japanese. After the fire an oriental school was established in the center of the city. The school question became an international issue. Undoubtedly segregation in schools is constitutional if the facilities are equal, but this segregation policy deeply offended the racial pride of the Japanese. In a number of school districts in California the Japanese constitute the major part of the attendants, the Japanese and whites attending the same school together. In addition to the American schools the Japanese often attend Japanese language schools in which they are taught the language, customs, history, and religion of Japan. It is claimed that these supplementary schools, 75 in number, neutralize the influence of the public schools, together with the home teaching and influence.[24] Yet it was the testimony of Professor Miller,[25] on the other hand, that there was no real problem connected with Japanese children on American soil.

9. *The Land Question*

The same writer believed that there was no real land problem in 1913 when the anti-Japanese land laws were enacted by the California legislature, but the Board of Control insisted that there had been a menace in 1913, and there was still a menace in 1919.[26] The board found that in 1919 sixteen per cent of the irrigated lands, the most productive in the state, were owned or under contract of sale or under crop contract by Japanese and Japanese-owned corporations. The law of 1913 [27] of California provided that aliens ineligible to citizenship might acquire land in the state to the extent prescribed in any existing treaty. But the existing treaty with Japan did not provide for purchase of agricultural lands by Japanese. The wording of the statute seemed to imply that California did not concede to the federal government full treaty power over the subject.[28] The statute further provided that such aliens might lease lands in the state for agricultural purposes for a term not exceeding three years. The same limitation was put upon corporations in which the majority of the stock was owned by such aliens. The intent of this law was clearly to prevent aliens who are ineligible to citizenship from owning land in California. But this law was evaded by the expedient of purchasing land in the names of American-born children. Few of these American-born children in 1913 or even in 1920 had attained legal age, so the purchases were made through guardians or trustees. Also corporations were formed to evade the law and purchase agricultural lands, the majority of stock being held by the American attorneys for the corporations. Regret was expressed that attorneys would thus barter their talents for the evasion of law. The result of the agitation was the passage in 1920 of an initiated measure, approved by the Board of Control, for the prohibition of these evasions.

Though this initiated bill came before the people with the active support of the public authorities, the governor expressing his desire and expectation that it would be enacted by an overwhelming majority of the voters, the informed Christian conscience of the state lifted its voice in protest. The American Committee of Justice[29] was organized and published its appeals in every county of the state. That nearly a third of the voters registered their dissent, heeding the arguments advanced by prominent educators, religious leaders, and men of affairs, overwhelmed their Japanese friends with a sense of gratitude, according to the *New World*,[30] a Japanese daily newspaper of San Francisco. Members of the faculty of Leland Stanford University[31] described the terms of the bill and condemned its policy in the following words: "This measure is designed to prohibit the leasing of land by aliens ineligible to citizenship, to prevent such aliens from holding shares in any corporation owning agricultural land, and to prevent the native-born children of such aliens from having land held for them by their parents. The reason most commonly advanced for such a law is to 'keep California white.' As a matter of fact, it will not have the slightest effect upon such a desirable end. The control of immigration is vested in the United States government. . . . The proposed measure also is contrary to the whole spirit of our institutions. Everyone must recognize that the Nation has the right to scrutinize carefully every alien whom it admits to its shores. But once admitted, the Nation must see to it that all aliens are treated with absolute fairness and impartiality." Yet on the other hand it must be noted that similar laws, though not so drastic, have been passed in other states of the union and in foreign states. Japan up to the time of the passage of this initiated law did not extend to aliens the right to own or lease agricultural lands.

10. *Citizenship Laws of Japan and the United States Compared*

The law of the United States deems children born abroad to American fathers, to be citizens of the United States, but this privilege does not descend to children whose fathers never resided in the United States. The law of Japan is similar in that Japanese, wherever born, are citizens of Japan, but this privilege descends without limit as to number of generations. Thus according to the laws of both nations there may be double citizenship. The United States gives an election to its citizens born abroad, between the ages of 18 and 21. Japan gives an election to its citizens born abroad, before the age of 15, acting through their legal representative, between the ages of 15 and 17, acting in their own behalf, but never after the age of 17, unless they have presented themselves for military duty. The United States recognizes the natural right of expatriation, but Japan does not recognize this principle, and citizens born abroad must obtain the permission of the Japanese government to renounce their allegiance to Japan. The policy of the United States is to release the allegiance of its citizens who have taken up permanent residence abroad, but the policy of Japan, like that of Germany formerly, is to hold on to the allegiance of its citizens. In case of war this dual citizenship is thought to be a positive danger.[32]

11. *The Policy of a Homogeneous Democracy*

The solution of the Indian problem has been a costly experience, attended by many mistakes. Had there been amalgamation in the early period of settlement the influence on our national character would have been unfortunate. The negro problem will never be solved till the two races amalgamate, but that solution ought not to be favored by either the white or the black. The almost impossible policy of segregation, justice, and mutual good will must therefore continue. But to add another race problem would invite disaster to our democratic system. However great is our admiration of Chinese, Japanese, and the other peoples of the Far East, and they are worthy of very sincere appreciation, we rightly desire a homogeneous population, so far as it may now justly be attained.

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[1] United States v. Northwestern Express Co., 164 U. S. 686.

[2] 16 Wall. 36.

[3] Willoughby, W. W., *Constitutional Law*, Vol. I., p. 270, Note.

[4] Hall, J. P., *Constitutional Law*, pp. 70 ff.

[5] According to Hall, p. 67, only two justices concurred with the chief justice on this point.

[6] *Revised Statutes*, 2169; *Compiled Statutes* to 1918, Sec. 4358.

[7] *Compiled Statutes* to 1918, Sec. 4359.

[8] *Ibid.*, Sec. 3647.

[9] 23 Ops. Atty. Gen. 509.

[10] *American Year Book* for 1925, p. 214. *Ibid.*, for 1926, p. 215. The Newlands' Resolution prescribed that "no Chinese . . . shall be allowed to enter the United States from the Hawaiian Islands." *Compiled Statutes* to 1918, Sec. 4335.

[11] 169 U. S. 649 (1898).

[12] *China and America Today*, pp. 163–166.

[13] State Board of Control of California, *California and the Oriental*, 1922, p. 7.

[14] *Compiled Statutes* to 1918, Sec. 4290 ff.

[15] State Board of Control, *op. cit.*, p. 115.

[16] *Ibid.*, p. 115.

[17] Dr. Luther Gulick, *American Democracy and Asiatic Citizenship*, p. 213.

[18] State Board of Control, *op. cit.*, p. 117.

[19] State Board of Control, *op. cit.*, pp. 105 ff.

[20] *Ibid.*, pp. 93 ff.

[21] *Ibid.*, pp. 175 ff.

[22] *Ibid.*, pp. 151 ff.

[23] *Ibid.*, p. 207.

[24] *Ibid.*, pp. 213 ff.

[25] Prof. Miller, American Committee of Justice.

[26] State Board of Control, *op. cit.*, pp. 45 ff.

[27] *Ibid.*, pp. 62 ff.

[28] Corwin, E. S., *National Supremacy*, pp. 1 ff.

[29] American Committee of Justice, *Arguments against the California Alien Land Law*, 1920.

[30] American Committee of Justice, *op. cit.*, Article from *New World*, Nov. 10, 1920.

[31] American Committee of Justice, *op. cit.*, Appendix No. 1.

[32] State Board of Control, *op. cit.*, pp. 195 ff.

CHAPTER IV

THE STATUS OF WOMEN

1. *The Ban Upon Coolie Laborers and the Emancipation of Women*

There are no inferior races, but if there are, the Chinese and Japanese, born in the United States, are not inferior to anybody. The children with snapping black eyes, young people with eager, alert faces, quick to catch American ways, and adults surrounding themselves with the evidences of their thrift and industry, show that oriental stock will grow and thrive in the new land. But orientals are different from occidentals and practically unassimilable, and would be quite so if they were here in overwhelming numbers. In the last chapter our purpose was to study the status and rights of an oriental population permanently established in our country, and the status and rights of immigrant orientals were considered only as related to the introduction of another permanent racial element. The ideal is a homogeneous people. Therefore Congress was justified in prohibiting the introduction of a vast coolie population, but a sharp criticism of the method employed was reserved for another chapter. It is the contention of the writer that the constitution should have been so construed as to give to Congress the same power over the admission to citizenship of orientals, born in the United States, as is conceded to Congress over the admission to citizenship of American Indians, born in the United States. The court, however, denied this power to Congress, and declared that orientals born in the United States were made citizens by the constitution. Now that their status is fixed they should have every protection of citizens, and if they ever need special protection the police power of the states is broad enough to come to their relief while the Fourteenth Amendment may be relied on to protect them from unjust discrimination by the states. The protection of oriental aliens will be discussed in its appropriate chapter.

The ban upon Chinese coolie immigration was established in 1882, the ban upon Japanese laborers, in 1924; in the mean time a movement was under way more in harmony with the liberal professions of our republic, the movement for the emancipation and enfranchisement of women. It was more than an agitation for suffrage, yet outstanding events were the introduction in Congress in 1868 of the Susan B. Anthony amendment, at the time not much more than a gesture meeting with ridicule, its introduction again in 1918 when it passed the house but was defeated in the senate, notwithstanding the support of President Wilson,[1] and its final introduction in 1919 when it was passed by both houses with the necessary majority, and after ratification by the required number of states was proclaimed Aug. 26, 1920, to be a part of the constitution.[2]

2. *Women in Home, School, and Industry*

It may be said that logically women constitute the first class the legal status of which requires definition, but we have been following the historical sequence in which great problems have been thrust upon the attention of our people. Yet in discussing the status of women we will begin as in the first chapter with the primitive Aryan family. The father was the protector from external danger. The mother was the maker of the home. The long period of gestation and the still longer period of infancy and childhood bound her for the greater part of her life to her offspring and kept her in a state of relative retirement. Thus there developed in women a gentleness, a tenderness, a sympathy, a spirit of devotion and sacrifice, and a power of endurance that have made motherhood one of the divinest words in human language.[3] It is the mother instinct in women that makes them incomparable nurses, not only of children but of the sick and wounded of whatever age. The battlefield lost something of its terror when noble women went out to nurse the wounded in the Crimean War, our Civil War, and the Great War. The art of healing comes naturally to women, and therefore when walls of prejudice were broken down, it was found that they made successful physicians. This mother instinct of women has made them in a preeminent way the almoners and the social workers, trying to alleviate and heal the ills of society. When factory girls need mothering, when women journeying to strange cities need guidance, when war-stricken lands need help, women are among the most successful organizers and workers.

In the primitive Aryan home the mother was the teacher of the children, especially in their early impressionable years. Women are the natural teachers of children, and so in fact to-day they are the teachers in all the grammar grades. We remember the women who taught us with gratitude and sometimes with veneration. Women are quite able, when permitted to obtain the necessary training, to teach the higher subjects in high school and college. Emma Willard of Troy broke down the barriers to women's advancement in this profession, and now we have great leaders among them.[4] Women, out of their deep emotional nature and strong sense of duty, have ever been the natural priestesses of religion. They have led the young unspoiled minds to grasp in some degree the mystic reality of their relation to God. Without such religious culture a man is poor indeed. Women are ever successful propagators of religion, but there is prejudice against their occupying the positions to which their gifts entitle them. Yet the Quakers have always admitted women to the ministry, and now many denominations admit them. A specialized form of teaching to-day is journalism. It requires quick intelligence, vivacity, and the ability to tell a good story. This women possess, and so they make good journalists.

In the primitive Aryan home there was the preparation of food in all its processes from the grinding of the grain. Then gastronomy was the one really important science. It is so still. In the home were made the butter and cheese consumed by the family. There too were the distaff and the loom. Not only were the fabrics made in the home, they were made up there into garments and patiently ornamented by the nimble fingers of women. In an industrial age when all these products of former domestic manufacture are made in factories, the women too have gone to the factories to make there what formerly they made at home. This migration from the home to the factory may be regretted, but it was inevitable. This change would not have been so lamentable if the girls found over them motherly women and not male slave drivers. Heartless competition made necessary laws for the protection of women workers, and also women inspectors were necessary to enforce the laws. But no class can expect the fullest legal protection unless it possesses the suffrage. Women are reluctant litigants in law suits, but their interests should be protected. To this end attorneys of their own sex may be expected to understand their point of view. At all events women are often successful lawyers. Not only are women capable of making money, they are safe custodians of it. A Welsh banker of Minnesota told the writer that he was able to acquire a fortune through putting his earnings in his wife's hands, so that all his life if he wanted ten cents he went to Mother for it. Women think in cents where men think in dollars. Not only do they become safe custodians of the week's wages, they become quick-witted, alert bankers.

In an age when the hunting season is restricted to a few weeks in the late autumn, there seems little for mere men to do. Women are the equals of men, if not their superiors, but after all they are different from men, and that difference will lead most women to find their proper sphere and their greatest joy in the home. Men need not fear the competition of women, for there is ample opportunity for all who have special aptitudes, whether they are men or women. The greatest liberty may well be given to all to choose their means of livelihood, both men and women. And women should choose, equipping themselves for self support, for riches fly and husbands too. With labor made honorable there will be women enough to go out to service and to work in factories and to make any other honorable contribution to the general comfort and progress. We look with contempt upon a man who fits himself for no career other than that of a man of leisure. Women are setting up the same standard for their sex.[5]

3. *Status of Women in Roman Law*

Since women in the United States and England and Germany have battered down the walls of legal discrimination which formerly restricted them and are now demanding the absolute destruction of any remaining inequalities, it may be profitable to study their status in Roman law.

In the earliest times the wife was transferred from the worship and power of her father to the worship and power of her husband by a form of religious sacrament. She came into the legal status of a daughter to her husband. Another form of marriage was a transaction like an ordinary transfer of property. A third form was prescription or use, an uninterrupted possession for one year. The husband had full property ownership with power of life and death.[6] But in later Roman law marriage became a simple contract, a lifelong union based on the mutual consent of the parties. Divorce then depended simply upon the will of the parties. But under the Christian emperors, particularly under Justinian who promulgated the final codification, there was legislation to prevent divorce, and penalties were imposed on unjust repudiation.[7] As to property rights the wife brought to her husband a dowry.[8] The husband had the management of this fund, but could not dispose of it or mortgage it. The wife had the independent management of her own property and a further right to see that her husband applied the income of the dowry to its legitimate purpose. The husband provided a similar fund of the same amount and for the same purpose, the support of the wife and the expenses of the marriage state. This was called the donation [9] and might be termed the marriage settlement.

Upon the death of the wife the dowry reverted to her heirs and the donation reverted to her husband. Thus outside the dowry and donation, one provided by the wife and the other by the husband, the property of each was distinct, and at the death of either the other did not inherit unless by will, which each was free to make. Thus the Roman law began by making a wife something between a daughter and property; it ended by treating husband and wife almost as equals, and almost equally the masters of their own property.

4. *Status of Women in English Common Law*

Having seen that Roman law under the influence of philosophy and Christianity softened the lot of women and ennobled the state of marriage, it is proper now to turn to the law out of which our own has grown. Under the old common law the civil rights of unmarried women were practically on a par with those of men. A widow could be the guardian of her own children. Thus far the Roman law was equalled or even surpassed. In the marriage state the husband possessed a limited right of correction, but this too had existed in the Roman law. This legal power of the husband has become obsolete, but wife-beating has not entirely disappeared in practice in the mother country. As to the property rights of the wife the common law, till repealed by modern statute law, did not compare in liberality with the later Roman law. The lands of the wife came into the life possession of the husband, and he could dispose of this life interest without her consent. The wife could not dispose of her own interest in her own lands without her husband's consent. The law gave the wife a dower interest in her husband's lands. He could not dispose of this interest of his wife in his lands without her consent. Her personal property became her husband's at marriage. At his death she had no claim upon his personal property, except her personal clothes, if he had debts or chose to give it to others by will, but if he died intestate she was entitled to a third. The husband was responsible for wrongs committed by his wife. She could not make a contract. He could desert his wife repeatedly and return from time to time to take away her earnings and sell everything she had acquired. Thus the legal personality of the wife was eclipsed by the legal personality of her husband. Divorce when granted at all was granted by act of Parliament, but till 1801 no woman dared apply for divorce, since women were advised to tolerate the infidelity of their husbands. A double standard was applied, one to husbands and another to wives. In those days women did not possess even a limited suffrage in England, but now women possess equal public rights with men, and many of the inequalities of the common law have long since disappeared.[10]

5. *Status of Women in American Law*

The common law was inherited by all our states except that in Louisiana a code, based on the Code Napoleon, takes its place. The same reforms that have in successive waves swept many of the old inequalities and injustices from the law of England, have been operative in this country. In the more progressive states, as also in several of the self-governing dominions of the British Empire, the reforming movement has attained greater speed than in the mother country. The agitation for women's rights began in the visit of a Scotchwoman in 1820. Strong-minded American women took up the cry and issued their Declaration of Sentiments in 1848. The campaign bore fruit immediately in New York, where a property bill was passed that same year, followed by a later act which completely emancipated the wife, gave her control over her property, allowed her to make contracts and engage in business, made her joint guardian of her children with her husband, and granted both husband and wife a one-third share in the property of the other in case of the other's death. Thus New York became the pioneer; Ohio and other states followed. Susan B. Anthony became the leading suffrage advocate. Wyoming, in 1869, when still a territory, was the first to give full suffrage. Already a limited suffrage had been granted in a number of states, and this in manifold forms prepared the way for eventual complete suffrage.

(1) *Personal Rights of Women*

Without attempting an exhaustive presentation several illustrative differences may be noted. Men and single women acquire the right of settlement[11] in a particular place within a state on the same terms, but a wife's settlement follows that of her husband. This becomes important in cases of poor relief, for localities often attempt to pass their poor on to some other. Some states provide that a wife, abandoned by her husband, may acquire settlement through authority of a court.

The right to acquire a legal residence has a more general importance. According to the common law the legal residence[12] of a married woman follows that of her husband, but some states, like Iowa,[13] make an exception of a wife seeking divorce. Reliance on such a law, however, might prove worse than futile unless the matrimonial domicile of the couple was already Iowa, for a woman, there divorced, marrying again, might be declared a bigamist.

A very important protection of young girls is to raise the age of consent. This in some states, following the common law, was as low as ten years of age. But most states had raised it, many to sixteen and some to eighteen, although it remains very low in some few states. The demand for proper protection is general in the country.[14]

(2) *Property Rights of Women*

Without attempting to cover the confusing medley of our laws illustrations will be taken from unreformed bodies of law, comparing their provisions with provisions on the same subjects enacted for the governance of progressive jurisdictions. Arizona was in 1914 a state where the common law was somewhat modified by Spanish influence. This may be compared with Colorado where the Spanish influence was slight and where full woman suffrage had been granted. In Arizona the husband controlled the wife's earnings; in

Colorado the wife controlled her earnings, and the husband could not assign his own without her consent. In Arizona she was compelled to sue jointly for personal injuries, and the damages recovered would be community property and in his control; in Colorado she could sue and be sued as if unmarried. In Arizona the husband was legal guardian of minor children; in Colorado the wife was joint guardian of their children with her husband with equal powers. Again we may compare the state of Mississippi with the district of Columbia. In Mississippi the husband controls the wife's earnings; in the district the wife controls her own. In Mississippi he manages her separate property; in the district she manages her own. In the district too she can sue and be sued and carry on business as if unmarried; in Mississippi married women have no such rights. In Mississippi the father is legal guardian of his children; but in the district both parents are equal guardians of their children.[15]

(3) *Labor Laws Relating to Women*

A great number of state laws affecting working women have been passed in recent years, following much the same movement in the industrial countries of Europe and the dominions of the British Empire, but generally social legislation in America follows not on the heels of British legislation but lags many years behind it. The industrial revolution did not so soon reach our land as it did the mother country. We held even more tenaciously to the philosophy of Classical Liberalism. We have been individualistic in the extreme and our jurists have been slow to catch the spirit of modern world jurisprudence. Our legislatures have been slow and timid lest laws, passed by every enlightened country, would be declared unconstitutional. When yielding to the accumulated evidence of trained investigators, laws so enacted have too often been declared invalid, not because of conflict with written constitutions but with legal doctrines read into them.[16]

It is not possible to do more than suggest the wide range of social legislation in the interest of women. It includes laws regulating the length of the working day or week. The day ranges from eight hours in the more progressive states to twelve hours in one backward state, applicable to mercantile establishments alone. Laws for a day of rest and for rest periods are found in many states. There are also laws regulating home work. Mothers' pension laws are an advanced form of social legislation.[17] A minimum wage law of Congress was operative in the district of Columbia, and similar laws were in force in some fourteen states.[18] Legislation governing the hours of women was based on the difference of women from men in their physical constitution and liability to exploitation. Specialists like Professor Commons were able to show conclusively that there was the same justification for minimum wage laws for women.[19] The United States Supreme Court by a five to four decision decided that the federal law was unconstitutional.[20] The weight of juristic knowledge was on the side of the minority. Following this precedent the minimum wage law of Arizona was invalidated.[21] Only minimum wage laws on a voluntary basis, like that of Massachusetts, are safe from judicial veto. Therefore we see the governor of New York in 1928 proposing " the establishment of a minimum wage board for women and minors, with investigative and recommendatory powers."

Social legislation in this country has frequently in its various forms made its appearance as protective legislation for women and children on the theory that they were not *sui juris,* like men, but wards of the state. Then, as it proved itself helpful to these classes, it was gradually extended to selected classes of men whose special claim for protection could on one basis or another be sustained. Women have furnished a useful entering wedge for such legislation as modern states find necessary, but which conservative America hesitates to enact. States which were early to adopt woman suffrage were leaders in enacting special protective legislation for women and children. Yet strangely enough the National Women's Party advocates the adoption of the Lucretia Mott Amendment which would guarantee men and women equal rights throughout the United States and in every place subject to its jurisdiction.[22] Such an amendment, if adopted, would strike down all special protective legislation for women, and therefore is opposed by many organizations of women and by the American Federation of Labor. Of course all social and economic injuries to women should be removed.

(4) *The Public Rights and Duties of Women*

In the year 1918 women possessed the right to vote for president and many other officers in twenty-one states, including fifteen states with full suffrage, four states with the so-called presidential suffrage, and two with participation in primary elections alone.[23] In addition they exercised a limited local suffrage in many states. At the close of that year so strong was the movement toward the passage of the suffrage amendment, in recognition of the splendid war work of women, that it was felt " the struggle was all over but the shouting." Yet the consummation of their hopes came in 1920 so late that in many states there was not opportunity for great numbers of women to register and vote in the presidential election of that year. In the older suffrage states it is claimed " that women voted in as large percentages as men, and even in larger percentages than men in small towns and rural districts."[24] Nevertheless it is estimated that in the 1920 election one-third of the eligible voters failed to go to the polls. This surrender of the right to vote by vast numbers of the electorate is traced back to the campaign of 1896, every year increasing numbers registering their indifference or content or discontent by abstention. In states like Indiana where the vote is close " three-quarters of the eligible electors came to the polls in 1920 and 1924." Gosnell[25] finds that in South Carolina in 1924 ninety-four per cent of the eligible voters stayed at home and in Pennsylvania more than half. It is claimed that this is a dangerous surrender to party managers, that voting is a duty, so important to the permanence of democratic institutions that a number of European democracies have resorted to compulsory voting.[26] The duty of voting must be insisted on, and various women's organizations are performing a patriotic service in their efforts to bring out the woman vote.

The Pennsylvania League of Women Voters has been active in investigating and exposing public abuses, such as the wasteful collection of taxes. The national organization has given its support to the passage of helpful federal laws, such as the maternity legislation and the independent citizenship of married women. The legislative committees of many women's organizations have been active and influential. The natural advocates of their programs are the nine women who have been sent to Congress and the 122 women who in 1927 were members of state legislatures.[27] Not all are supporters of humanitarian legislation, for the author sent a questionnaire to a woman legislator in one of the middle Atlantic states who declined to answer the questions till she had the permission of her ward leader. It is to be hoped that not many are so pusillanimous. A vast number of executive positions are held by women, in the federal, state, and municipal governments. Public life has distinctly gained by the entrance of women into office, but there have been conspicuous failures as well.[28] Women and men too should be proved and trained in the lower grades of office and advanced as they prove their worth. Ex-Senator Baily [29] of Texas opposed the extension of suffrage to women because they were incapable of performing the three principal duties of citizenship: military service, sheriff service, and jury service. But in twenty-one states [30] where they are eligible for jury service, the system has not descended in popular disesteem because of their admission. It is claimed "that women are especially needed in cases involving women and girls and in cases affecting public morals." As to military and sheriff service they are competent, when trained, for either. A Florida sheriff's wife in trailing, arresting, and bringing back escaped prisoners, and the Russian Battalion of Death [31] have demonstrated what women can do. From the training of girl scouts they should graduate into the militia and have one summer of intensive military training. No greater health measure for women could be proposed.

[1] *American Year Book* for 1918, pp. 18 ff.

[2] *American Year Book* for 1919, pp. 58, 227 ff.

[3] Drummond, H., *The Ascent of Man*, pp. 267 ff.

[4] Beard, Mary R., *Woman's Work in Municipalities*, "Education," pp. 1 ff.

[5] Allen, W. H., *Woman's Part in Government*, (1911). Parsons, Alice B., *Woman's Dilemma*, (1926). Key, Ellen, and others, *The Woman Question*, (1918). Muir, Willa, *Women: An Inquiry*, (1926).

[6] Morey, W. C., *Outlines*, pp. 30, 243. Sohm , R., *Institutes*, pp. 452 ff.

[7] Morey, W. C., *op. cit.*, pp. 151, 244. Sohm, R., *op. cit.*, p. 460

[8] Morey, W. C., *op. cit.*, p. 248. Sohm, R., *op. cit.*, p. 465.

[9] Morey, W. C., *op. cit.*, p. 249. Sohm, R., *op. cit.*, p. 473.

[10] Stinson, A. L., *Women under the Law*, pp. 1 ff.

[11] Cooley's *Blackstone*, Book I, p. 363. Howell's *Annotated Statutes of Michigan* (1882), Sec. 1788.

[12] Cleveland, F. A., *American Citizenship*, p. 45.

[13] Danger of such a marriage after divorce is illustrated by decision in Atherton v. Atherton (181 U. S. 155, 1900), where the divorce of the wife obtained in a state, not of their matrimonial domicile, was invalid.

[14] The law of Michigan is 16 years. Howell's *Annotated Statutes* (1882), Sec. 9098.

[15] Stinson, A. L., *Women under the Law*, (1914).

[16] Commons and Andrews, *Principles of Labor Legislation*, pp. 30, 31.

[17] United States Department of Labor, *Bulletin of the Women's Bureau, No. 16, on State Laws affecting Working Women.*

[18] United States Department of Labor, *Bulletin of Women's Bureau No. 42, List of References on Minimum Wage for Women in the United States and Canada. Bulletin of Women's Bureau, No. 12, The New Position of Women in American Industry. Bulletin of Women's Bureau, No. 25, Women in the Candy Industry in Chicago and St. Louis. Bulletin of Women's Bureau, No. 23, The Family Status of Breadwinning Women. Bulletin of Women's Bureau, No 41, The Family Status of Breadwinning Women in Four Selected Cities. Bulletin of Women's Bureau, No. 8, Women in the Government Service.*

[19] Commons and Andrews, *op. cit.*, pp. 167 ff.

[20] Adkins v. Children's Hospital, 261 U. S. 525.

[21] Murphy v. Sardel, 70 L. ed. 25.

[22] *American Year Book* for 1925, pp. 649 ff. *American Year Book* for 1926, p. 642.

[23] *American Year Book* for 1918, p. 238.

[24] *American Year Book* for 1926, p. 647.

[25] Gosnell, Harold F., in F. G. Crawford's *Readings in American Government,* p. 471.

[26] Spring, S., in Crawford's *Readings,* p. 466.

[27] *American Year Book* for 1926, p. 643.

[28] Mrs. Florence E. S. Knapp, Secretary of State, New York, is an instance in point.

[29] *American Year Book* for 1918, p. 18.

[30] *American Year Book* for 1925, p. 650.

[31] Bousfield, P., *Sex and Civilization.*

CHAPTER V

THE STATUS OF CHILDREN

1. *The Relation of Protective Legislation for Women to Protective Legislation for Children*

The movement for the emancipation and enfranchisement of women which began in the Jacksonian era was brought to a splendid triumph a century later. The status of children is always closely related to the status of women. The industrial revolution which took women from the home to the factory had an appalling effect upon the children of that period, first in England and later in every country which adopted the new industrialism. The result was a revolution in the minds of the people as to the function of government and the necessity of legislation. Social legislation came in ever increasing volume. The Great War held back this sweeping flood for a time, but with peace the movement began to roll on again with currents of reaction setting in here and there in various countries.[1] Social legislation, in its relation to children, made its greatest effort in this country in the passage of the Child Labor Amendment by Congress in 1924 by an overwhelming vote. This was followed by a surprising reaction and the temporary triumph of deceivers and deceived. It is to be hoped that the leaders now in training in our universities will have the brains and hearts to carry this movement to triumph by the ultimate ratification by the legislatures of three-fourths of the states. Fortunately there is no time limit within which this ratification must take place.

2. *The Child and Roman Law*

One of the brakes on progress is the popular superstition that law is static, that the law was made by the inspired wisdom of an indefinite past, and that it is dangerous and impious to try to improve the law. On the contrary law is the expression of the civilization, the culture, and the religion of a people. If the people are progressing their laws must change for the better. In substance and in enforcement there must be improvement. This idea of the changing nature of law is illustrated by the Roman law. Because Roman law was a changing system and yet was the foundation of modern law the author frequently begins the discussion of a particular subject with a presentation of the law of Rome on that subject.

According to the early Roman law a father had the power of life and death over his children. He could sell them or make what disposition he liked. At the birth of a child he could recognize it or order its exposure. Thrown away it might die or be rescued by a person more brutal than its unnatural father, to be brought up as a slave, prostitute, or beggar. Religion and morals, exercised through the ascending groups, based on kinship, were employed to curb this legal power of the father. A child was called an infant till the completion of the 7th year, and an *impubes* or youth from the completion of the 7th year to the completion of the 14th year if a boy, or of the 12th year if a girl. Young persons were called minors from the age of puberty to the age of 25 years. Even at that age they did not become their own masters, for sons, whether married or not, and daughters, till married, were under the power of the father till his death. When the father died his children became *sui juris,* meaning no longer under parental authority. But if they were still infants or youths, guardians were appointed. Beyond the 14th year the boy had full proprietary capacity, but he was permitted to apply for a curator whereupon he ceased to have full proprietary capacity till he reached the age of 25 years.

As the state became stronger and more conscious of its duties the law as to the power of the father was progressively changed to meet the progressing standards of religion and morals. The legal principle was established that the state is the guardian of the child, the guardian-in-chief, above all other guardians. In the time of Justinian the last vestige of the right of sale, possessed by the father in relation to his son, was destroyed. The proprietary capacity of the son during the life of his father was so increased by successive Christian emperors that in the time of Justinian the only incapacity continuing to attach to a son during the life of his father was his incapacity to acquire full ownership in property from his own father. What his father gave him remained technically in the ownership of the father. Thus the Roman law began with an exaggerated conception of the proper power of a father over his children, no matter what their age. It gave him absolute power. Gradual changes were introduced till only limited powers of chastisement and correction remained to him. The state had stepped in to protect the child. The state was above the father and above the guardian.[2]

3. *The Child and German Law*

This Roman law idea, often described as paternalism, is characteristic of all continental European countries, and is especially characteristic of Germany. Under the monarchy Germany was paternalistic, and the new constitution is strikingly so. The power and duty of the parent is recognized, but the supreme power and duty of the state is asserted. Let us note the provisions on community life which present the relative powers and duties of parents and the state in relation to children: "It shall be the duty of the state and of the municipalities to maintain the purity, health, and social welfare of the family.[3] . . . The education of their children for physical, intellectual, and social efficiency is the highest duty and natural right of parents, whose activities shall be supervised by the political community [4] . . . Youth shall be protected against exploitation as well as against moral, spiritual, or physical neglect. The state and the municipalities shall make the necessary provisions." [5]

4. *The Child and English Common Law*

According to the common law a person under the age of twenty-one years is an infant, and one above that age is an adult. A man is said to be *sui juris,* for the meaning of that phrase in Roman law is not followed in the common law. A man is *sui juris* according to the common law because he possesses all the rights to which a freeman is entitled. He is not under the power of another as a slave, a minor, or the like. A woman is a ward of the state, even after her full emancipation and enfranchisement, because she is still in the need of special protective legislation. A child is a ward of the state, because he is not an adult and in view of his youth and immaturity is also in need of special protective legislation. While a person is an infant till the age of 21 years the infant may perform many legal acts before arriving at full age. A male at 14 is of discretion and may consent to marry. He may choose a guardian, and, if his discretion be proved, he may at common law make a will of his personal estate. He may act as an executor at the age of 17. A female at 7 may be betrothed or given in marriage. At 9 she is entitled to dower. At 12 she may consent to marriage, and at 17 at common law she may act as executrix. In general an infant is not bound by his contracts, but the contract cannot be avoided by an adult with whom the infant deals. The protection which the law gives him to protect him from improvident contracts, does not permit him to do injury to another. Therefore an infant is responsible for his torts, as slander or trespass, and an infant is responsible for crime, although an infant under 7 years cannot be guilty of a felony or be punished for a capital offense. Such is the common law as to children when not changed by legislation.[6]

While the common law in the period of the industrial revolution was archaic and inadequate in some provisions and was wisely protective of children in others, it was not in the spirit of the times to take interest in the life of children. A supposedly humanitarian theory had been adopted, and disturbing facts which might prove it false, were not to be examined. It was a time of great inventions, reorganization of industry, movement of population, increase of wealth, intense competition, breaking down of ancient privileges, loss of occupation through changes in methods, and terrible suffering by multitudes of employers and employees who were defeated and crushed in the mad struggle. The desolate work houses were overcrowded. A large proportion of the working people was on the poor rates. The children of the poor were herded, exploited, and broken in body and soul. The philosophy of the time was Classical Liberalism, which said in effect: "Take away from every person any special privilege or protection; let the fit survive and unfit perish." Benevolent thinkers might be shocked to see women and children trampled down, but they quieted rebellious scruples by the sage consideration that it was a necessary sacrifice. At a later time even Herbert Spencer defended this philosophy, but the Christian conscience of England rebelled against it. Investigation followed investigation. Remedial measures came in quick succession. A mental revulsion, a social transformation swept over England and every colony and continental European state where the industrial revolution had supplanted the still older domestic system of production. No longer were little children "regarded simply as wage-earning machines."[7] The legislation of the new age was finally consolidated in the act of 1908. Says Alden in *Democratic England:* "The Children's Act of Mr. Herbert Samuel is, in itself, a direct illustration of the great interest that is taken in every question affecting the physical and mental well-being of the child. . . . It deals with practically every form of infant and child life, the protection of infants and little children, the treatment of children in reformatories and industrial schools, the question of juvenile crime, children's courts, and probation officers. The Act supplements the deficiences of previous legislation."[8] An instance cited is provision of meals for necessitous children. It is impossible to even sketch the wide range of recent legislation. A statement of Mr. Alden is important in view of legal arguments advanced in this country. " The disgrace of child labor has not been completely obliterated, although the right of the State, over against that of the employer or the parent, has more strictly limited child labor. However much such labor may be regarded as a necessity, it is a mistaken policy." [9] Speaking of the policy of the British Government when he described it in 1912, he said: " The policy of the present government is to cut down child labor; to raise the school age; to make education in some sense compulsory up to the age of 16, and, finally, to insist upon some technical instruction or manual training which will allow of entry to a skilled industry later on in life." [10]

5. *The Child and American Law*

The common law of England is the law of every American state but one, as we have seen. The industrial revolution came in course of time and we ceased to be almost exclusively an agricultural country. We outstripped every country in the volume of our industry. The philosophy of the Classical Liberal was also adopted here, especially by those who interpret the law, written and unwritten. Child labor in industry with the usual evils attending it was introduced here. In spite of the opposition of reactionaries in office and out of office the great Christian conscience of the people registered true here just as it had in England and in the continental industrial states. Laws which had been effective in other countries were adopted here. In some states foreign standards were in some respects surpassed.[11] Raymond G. Fuller in *Child Labor and the Constitution,* published in 1923, says: " Child labor . . . is no longer a matter of cruel slavery of little children in mines and factories. . . . The worst evils of forty, twenty, even ten years ago have been removed or vastly abated, and the method of prohibitory legislation has played an effective part in this accomplishment." Yet he asserts, " Abuse of children through abuse of their labor power continues to exist, and atrociously bad conditions may be found in certain occupations." [12]

(1) *The Diversity of State Law, Especially of Child Labor Law*

Mr. Bruce M. Watson, managing director of the Public Education and Child Labor Association of Pennsylvania, said: " Many states do not protect children from exploitation in employment. They permit little children at very early ages to be employed long hours, at unsuitable employment, under unfit conditions, the children thus growing up without education and with impaired physical and mental development. According to the report of the Judiciary Committee of the House of Representatives . . . only 13 states have laws which meet all the standards set up by the former federal child labor laws. Employers evade the child labor and education laws by sending work to another state or by bringing laborers from another state." [13]

In 1924 the writer was told by a well-informed manufacturer, himself opposed to child-labor legislation, that in one high-standard state (Massachusetts) great plants were idle because of the inability to compete with low-standard states which had recently established great manufacturing enterprises. Indeed the high-standard state was sending money and managers to build factories in states where legislation was favorable and labor cheap. The writer could see that there was every prospect of reaction in high-standard states both in legal standards and their enforcement.

In the winter of that year the author visited the capitals of several southern states which were making astonishing progress in the development of manufacturing. In one state where he went straight to officers whose duties brought them into direct knowledge of child conditions; he was told that poor farmers and mountaineers move to the industrial centers and there live on the labor of their children. An officer reported that his department had found many maladjustments among families of this class.

This evidence is quite in accord with the declaration of the former dean of the law school of the University of Pennsylvania that when he and others went before various legislative committees in behalf of higher state laws on child labor, their opponents argued that higher standards would drive their clients out of the state and leave their employees to starve.

(2) *The National Character of the Problem*

In the year of 1928 we found the governor of Massachusetts saying in his message: " We cannot have our industries operated so that the employees work fewer hours and earn more money and the employers pay more taxes, and at the same time have the product compete in price with those of other states where the women and children work longer hours, where wages are low, and where taxes are much less." [14] The governor is arguing for economy, but that is a palliative; there is no solution but a lower standard or a uniform standard.

Since no state has the power to bar out the products of low-standard states, there can be no adequate relief but in uniform laws. Through state action this cannot be obtained so long as certain states are determined to build up their industry by the sacrifice of their children, their women, and their poor. Uniformity can be obtained only through federal action.

(3) *The Federal Child Labor Law, Enacted Under the Commerce Power, Declared Invalid in Hammer v. Dagenhart*

There was an emphatic demand of public sentiment for the passage of a federal law prohibiting the interstate commerce in the products of child labor. Both political parties stood for the principle of the proposed law.[15] Senator Beveridge, the learned biographer of Chief Justice Marshall, made a three days' speech in behalf of a bill of this character.[16] Finally a child labor law was enacted in 1916 as a police measure under the commerce power and went into effect in 1917. It was declared unconstitutional in 1918 by a divided court of five to four.[17] The court held that there was no intrinsic evil in the goods themselves, but the minority asserted that the power of Congress over interstate commerce was unqualified and included the power to prohibit, if Congress found that the national welfare so demanded. Professor Powell of Columbia University said: "Where the court made a great mistake in the child-labor case was that it did not see that interstate transportation was a cause of the evil." [18] Professor Freund of the University of Chicago Law School suggested that Congress retain the act on the statute books in the hope that at some future time a favorable opportunity for the reconsideration of its validity might be presented.

(4) *The Federal Child Labor Law Enacted Under the Taxing Power, Declared Invalid in Bailey v. Drexel Furniture Co.*

The decision in Hammer v. Dagenhart by a divided court was disapproved by great men who really know the law and by public sentiment in Congress and outside. An amendment to the revenue act of 1919 was drafted jointly by Senators Pomerene (Democrat) of Ohio, Lenroot of Wisconsin, and Kenyon of Iowa (Republicans), and was designed to replace the child-labor law that had been declared unconstitutional by the Supreme Court.[19] The legal knowledge of Senator Pomerene was more recently recognized by his appointment as one of two attorneys to conduct the oil cases for the government. The new federal child labor law was enacted under the taxing power as an amendment of the revenue act. This law was regarded by the eminent lecturer on government at the University of Pennsylvania as absolutely proof against judicial annulment. Nevertheless the court declared the law unconstitutional, May 15, 1922. Professor Corwin of Princeton said of this decision: "At one stroke a new canon of constitutional interpretation is created and an out-of-date one is revived. . . . The only thing to be said for the new doctrine is that it will probably prove so unworkable in practise that it will not long survive." [20]

(5) *The Attempted Federal Amendment*

While each of these child-labor decisions overrode a long succession of precedents, the second one particularly by reviving a doctrine, formerly held by one of the great political parties but repudiated by its practice when in power, that constitutional taxation is for revenue only, and by introducing a new canon, often brought to the notice of the court but consistently repudiated, that the court may impute a wrongful motive in the legislation of Congress, otherwise valid, made clear the judicial veto upon effective federal child-labor legislation under the constitution as it stands. The only recourse was to fall back upon the states or to amend the constitution. Not much reliance could be put upon the former of these alternatives, for if some states clung to their low standards in spite of the incentive of federal law, how much greater would be their determination to resist the general will of the country, if there were no means to enforce that will! Furthermore with low-standard states sending their child-made goods into the general trade of the country it was inevitable that manufacturers would plead for lower standards in high-standard states. During the war there had been a rush of children into industry. It had been advocated as a patriotic service, and so, for a time, law enforcement had been relaxed. Now after the war it was difficult to restore rigid administration of child-labor laws. It was necessary therefore to turn to the other alternative.

In response to dominant public opinion President Harding recommended the submission of a child-labor amendment to the people of the states. He said: " We have two schools of thought relating to amendment of the constitution. One need not be committed to the view that amendment is weakening to the fundamental law, or that excessive amendment is essential to meet every ephemeral whim. We ought to amend to meet the demand of the people when sanctioned by deliberate public opinion."[21] This recommendation was not received as a partisan measure, for the amendment was passed by a vote of 297 to 69 in the House of Representatives and 67 to 23 in the Senate. The amendment was as follows:

"Section 1. The Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

"Section 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."[22]

This amendment which was thus proposed by Congress June 2, 1924, was referred to the people of Massachusetts in an advisory referendum in the following November and overwhelmingly defeated. In the year 1925 it was before 43 legislatures and rejected by 22, which is more than a fourth of the states and therefore insured rejection. In that year only four states ratified the amendment and none did in 1926.[23] The defeat appeared to be definite. In 1925 a high officer of a southern state was asked why the legislature had rejected the amendment, and the answer was, an unintelligent farmer legislature, misled by the cotton manufacturing interest, but it was hoped that in five years these well-meaning members or their successors would be enlightened and would ratify the amendment which would be of incalculable benefit to the future manhood and womanhood of the state. Lawyers in the employ of the National Association of Manufacturers appear to have led this attack on a reform sponsored by a vast array of organizations standing for sane and constructive social legislation.

Such a reversal of what appeared to be intelligent public sentiment is strange beyond belief. But skillful magicians played upon the prejudices, superstitions, and interests of good people. They warned the people from laying unholy hands on the ark of the covenant, the constitution; from changing the ideal balance between matters of nation-wide interest and of state interest which had been discovered by the framers and must remain unchanged like the laws of the Medes and Persians; from the dangerous and growing evil of collecting taxes in Massachusetts and spending the money for human betterment in Mississippi; from imposing social legislation on Mississippi not locally desired; from encroaching on states' rights; and from appealing to the nation to reverse a sacrosanct decision of the United States Supreme Court. These arguments appealed to members of state legislatures, for it is of the very nature of political organs not to surrender power, except under the compulsion of public sentiment. There was apparently a reversal of public sentiment. Yet temporarily there was a wide interest in child-labor legislation under state auspices, but in 1926 there was an apparent reaction when many bills were presented to let down the standards. Most were defeated, but the very attempts reveal a danger. Two decisions of the attorney general of Missouri, declaring child-labor laws unconstitutional, are regarded as most serious setbacks and contrary to world thought and experience.[24]

The policy of conservation of the nation's greatest wealth, its children, has met but a temporary repulse, not a permanent defeat. Yet the ill-effects of the delay may be felt for generations to come. " When fifty-five per cent of the men from Pennsylvania who were examined in the first draft were rejected as physically unfit for military service, John A. Lapp explained this exceptionally high rate as probably due in large measure to the fact that Pennsylvania for some twenty-five years had not had an adequate child-labor law."[25] The slaughter of the innocents will go on till the enlightened conscience of the people of the nation is aroused. Ultimately reform is certain.

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[1] Alden, P., *Democratic England*, pp. 28–61.

[2] Morey, W. C., *Outlines of Roman Law*, pp. 30 ff, 240 ff. Sohm, R., *Institutes*, pp. 482 ff. Poste's *Gaius' Institutes*, pp. 61 ff. Sandars' *Institutes of Justinian*, pp. 29 ff. Muirhead, J., *Historical Outline*, pp. 105 ff.

[3] McBain and Rogers, *The New Constitutions of Europe*, "Germany," Art. 119.

[4] *Ibid.*, Art. 121.

[5] *Ibid.*, Art. 122.

[6] Blackstone, W., *Commentaries*, Book I, pp. 446 ff. Kales, A. M.,

Domestic Relations, pp. 357 ff. Andrews, J. D., *American Law*, Vol. II, pp. 647 ff. Stephen's *Commentaries*, Vol. II, pp. 331 ff.

[7] Alden, P., *op. cit.*, p. 32.

[8] *Ibid.*, p. 33.

[9] *Ibid.*, p. 53.

[10] *Ibid.*, p. 54.

[11] Commons and Andrews, *Principles of Labor Legislation*, p. 308. Loughran, Miriam E., *The Historical Development of Child Labor Legislation in the United States*, 1921.

[12] Fuller, R. G., *Child Labor and the Constitution*, pp. IX ff.

[13] Watson, B. M., *Publication No. 103 of the Public Education and Child Labor Association of Pennsylvania*, "The Truth," pp. 3, 4.

[14] *American Political Science Review*, Vol. 22, p. 646.

[15] Fuller, R. G. *op. cit.*, p. 237.

[16] *Ibid.*, pp. 237, 273.

[17] 247 U. S. 251.

[18] Fuller, R. G., *op. cit.*, p. 240.

[19] *American Year Book* for 1919, p. 52.

[20] Fuller, R. G., *op. cit.*, p. 242. Professor Corwin also criticizes the decision in *American Political Science Review*, Vol. 16, p. 612.

[21] Fuller, R. G., *op. cit.*, p. 252.

[22] Watson, B. M., *op. cit.*, p. 2.

[23] *American Year Book* for 1925, pp. 676 ff. *American Year Book* for 1926, p. 685. McBain, H. L., *The Living Constitution*, pp. 160, 161.

[24] *American Year Book* for 1926, pp. 685 ff.

[25] Fuller, R. G., *op. cit.*, p. 275.

CHAPTER VI

CITIZENSHIP BY BIRTH ABROAD TO AMERICAN FATHERS

1. *Review of Jus Soli or Right of Place*

We have been studying various classes of persons whose country of origin was the United States. We have seen that even by the strict construction of the right of place as inherited from England certain persons born in the national territory were not regarded as members of the nation, but were excepted under the fiction of extraterritoriality. Just as the common law was modified by administrative, judicial, and legislative action to meet conditions in America, so the law of the soil was modified in these same ways to meet the conditions of the country, resulting in a broad construction of the right of place. The general principle is that persons born in the national territory are members of the nation, but this principle is subject to necessary exceptions. The first of these was the tribal Indian, who was certainly born in the United States but by a fiction of the law was regarded as not born subject to the jurisdiction thereof.[1] As the necessity of exceptional treatment passed away Congress admitted the Indians to the body of citizens, but some degree of exceptional treatment will always be necessary because of the nature of the Indian.

Negroes, born in the United States, though descendants of slaves, were in the early bloom of idealism brought under the strict construction of the law of the soil by judicial decision,[2] but later when slavery was entrenched in a dominant section of the country and free negroes were felt to be a menace, the United States Supreme Court decided that negroes were not citizens of the nation, or of the states in the sense of the federal constitution.[3] This broad construction of the law of the soil was overturned by the Fourteenth Amendment, for the negroes concerned were certainly born in the United States and were subject to the jurisdiction thereof, and now they were declared citizens, but the broad construction of the law of the soil would still be appropriate for classes not subject to the jurisdiction, since this phrase itself was a legal fiction inserted to make exceptions possible.[4]

The next problem which we have considered was raised by the oriental. Our special interest was in the oriental born in the United States. It was possible to apply either the strict or the broad construction of the law of the soil, according to one's measure of the necessity involved. The first determination would naturally fall to administrative officers, with appeal to the courts by the aggrieved party. In the inchoate state of the law decisions might be variant. But when public sentiment is aroused it generally falls to Congress to express the sovereign will in law, and upon the subject of citizenship this was the proper course since the Fourteenth Amendment stated the general principle of the law of the soil, added the legal fiction of jurisdiction, and gave Congress express power to pass legislation to enforce the policy of the amendment. The judiciary, however, instead of inviting Congress to clarify the law, read the strict construction of the law of the soil into the constitution, and forestalled congressional determination of the question.[5] At all events good citizens desire a solution that posterity and the world will acclaim as just.

A still more important question demanded solution at the hands of the state and nation. Women are born in the United States and are subject to the jurisdiction thereof, but they are not *sui juris* because of their natural constitution, quite irrespective of the possession or non-possession of the suffrage. By the same constitutional rule children are citizens, but they through their immaturity and weakness are wards of the state and nation. Adequate protection cannot be given to either of these great classes, either by the nation or by the states. Pennsylvania, for example, seems to have surrendered a part of her sovereignty not to the United States but to the state of North Carolina,[6] as the constitution has been interpreted.

In our studies we have noticed that each class tends to advance to a larger possession of the privileges and immunities implied in full membership in the nation. In each there is an advance from abnormal law toward normal law. Yet in each class there will always remain some vestige of actual difference in nature which will demand a corresponding difference in protective legislation.

While abnormal law tends to wear away and approach the normal, and unjust discriminations against the several classes are in process of elimination, the ultimate expression of the right of place tends away from the broad construction, so necessary in a formative period, to the strict construction, given in the home land when that was as homogeneous as this country hopes to become by the blending of its white races. This tendency in the development of the law is marked.

This tendency may be illustrated by administrative and judicial cases. Secretary Seward held in 1868 that "the son born in this country of a native Prussian acquired the right of electing to which country he should claim citizenship." One may challenge this statement unless it was intended only to mean that this American citizen, having taken up residence in Prussia, could expatriate himself under our laws on reaching his majority. Secretary Evarts in 1880 made a similar decision. But Secretary Frelinghuysen in 1884 made a decision not in accord with these precedents. A child born in this country of Saxon parents was taken in infancy to Saxony by its parents. Young Hausding later applied to our government for a passport, but was refused on the ground that the parents were only temporarily in the United States and were not subject to the jurisdiction thereof. Therefore the child, though born in the United States, was not at the time of its birth subject to the jurisdiction. In 1885 Secretary Bayard made a similar decision. In this case it was plain that the parents lived in this country several years, so that it would be difficult to say that they had not attained a domicile here. The child returned to Germany with its parents, and when in later years young Greiser applied for a passport, it was refused on the ground that the parents were not subject to the jurisdiction of the United States at the time of his birth. This again was a departure from the strict construction of the law of the soil. But in 1901 in a somewhat related case the department of state notified the Imperial German embassy that a previous decision of the treasury department had been overruled by a federal court, and the treasury department had accepted the decision as binding on the department. The meaning of this was the full acceptance of the strict construction of the right of place. Again in the same year of 1901 Acting Secretary of State Adee said: "The principle of the department is that birth in the United States, irrespective of the nationality of the parents, confers American citizenship." [7] Decisions of the courts had similarly been variant but a line of decisions the most important of which was the case of Wong Kim Ark,[8] decided in 1898, led to a clearing of the subject and acquiescence by the administrative departments as stated above. It may be added that the judicial determination of the law of the soil was a premature determination which probably would have been reached ultimately in the orderly development of the law when the conditions of the country made it appropriate and necessary.

This law of the soil, derived from the common law of England, and operative in the British Empire and the United States, has been accepted by Portugal and many of the Latin American states.[9] Wherever a person is held to be subject to the allegiance of the sovereign of the territory of his birth, by reason of his birth there and not by reason of his parentage, and no election is given him, there is full adoption of the right of place. By this rule Switzerland is to be classed with the United States, and possibly many other countries which are usually reckoned as countries of the right of blood. Indeed the law of the soil in part has been very generally adopted by the nations of the world.

2. *Jus Sanguinis in Europe and Combinations of Jus Sanguinis and Jus Soli*

The opposite and possibly more natural principle of the Roman law is that the child, born in a foreign country, is the subject of the state of which the parents are citizens. This is the *jus sanguinis* or right of blood. The child inherits the nationality of the parents. "The *jus sanguinis* is followed by Austria, Germany, Hungary, Sweden, Switzerland, and by some of the smaller European states." [10] Indeed it is as characteristic of the continent as the *jus soli* is of England.

The law on citizenship of most countries, including several of those named above, comprises features of both systems. For example, "The laws of Belgium and Spain regard the child of an alien as an alien, though on attaining majority the child may choose the citizenship of the country of his birth. The French laws of . . . 1889 and . . . 1893 consider as subjects the children born abroad to French citizens, also the children of foreigners born in France, unless these children within one year after attaining majority elect the nationality of their parents. Most states allow the descendants born to foreigners sojourning within their limits to elect their allegiance on attaining majority. Switzerland, however, strongly maintains the *jus sanguinis,* without according any choice to the descendants born to foreigners within her limits, or to her own subjects born abroad except by formal renunciation of citizenship. Thus the child of a citizen of Switzerland born in France would be by French law a citizen of France, and by Swiss law a citizen of Switzerland." [11]

It may be said that continental European countries began with *jus sanguinis* as the law by which the vast majority of their citizens at home and in foreign countries attained their status as citizens, and *jus soli* was added, generally only in part, as a law under which children born in the country to foreigners might be given the status of natural-born citizens, and yet election was given to them on the ground that their normal allegiance was to the sovereign of their parents. Therefore wherever a person is held to be subject to the allegiance of the sovereign of his parents, by reason of his birth to them and not by reason of his place of birth, and no election is given him, there is the full adoption of the *jus sanguinis.* Yet as the European countries have very generally surrendered the doctrine of perpetual allegiance and recognize the right of expatriation, though often with rigorous conditions, there is in some sense an election given to adults at least. It may be on the condition of military service. It is still, however, the policy of some countries to hold on to their citizens, born and resident abroad, even in successive generations, permitting men of the blood to regain the citizenship of their fathers, when lost, without return to the fatherland and without prejudice to their citizenship gained under the law of the soil in the countries of their actual residence.[12] Germany, Japan, and Argentina have laws of this character with various degrees of difference. If there are two million persons in Europe, as estimated, who are citizens of no country, there must be a far greater number in Europe and America who are citizens of two countries, of one under *jus sanguinis* and of the other under *jus soli.* Here is a serious problem for international solution.

3. *Jus Sanguinis in England*

If continental countries borrowed from the common law the principle of *jus soli* for the purpose of giving the children of aliens, born in the country, the status of natural-born citizens, so the English at a far earlier period borrowed from the Roman law the principle of *jus sanguinis* for the purpose of making the foreign-born children of subjects natural-born subjects. This was done as far back as the time of Edward III to give protection to children born abroad, of merchants. Again after the Restoration laws were passed under Charles II to make the children, born abroad, of refugees, natural-born subjects. In the time of Blackstone the law of England provided " that all children born out of the king's legiance whose fathers (or great fathers by the father's side) were natural-born subjects, are now to be deemed natural-born subjects themselves to all intents and purposes." [13]

4. *Jus Sanguinis in the United States*

Van Dyne in *Citizenship of the United States,* says: "It was almost universally conceded that citizenship by birth in the United States was governed by the principle of the English common law. It is very doubtful whether the common law covered the case of citizens born abroad to subjects of England. Statutes were enacted in England to supply the deficiency, or to remove the doubt which existed in regard to the matter. Hence, it was deemed necessary to enact a similar law in the United States to extend citizenship to children born to American parents out of the United States." [14]

In 1790 it was enacted by Congress that "children of citizens of the United States that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural-born citizens." [15] This law was changed from time to time, but in 1855 it was enacted in its final form as follows: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." [16] Here we must note that our government, beginning with *jus soli* as its normal law, and *jus sanguinis* as a special law to apply to a small class, has felt that it would be an embarrassment to have successive generations of citizens born abroad who demanded the protection of their government but did not contribute to its strength. The law of 1907 on expatriation has a section which refers to this class of persons. It is as follows: "Section 6. That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section 1993 of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority." [17]

5. *Are Persons who Attain Citizenship by Birth Abroad to American Fathers Natural-born Citizens or Citizens by Collective Naturalization?*

If the Fourteenth Amendment is to be considered an exhaustive definition of citizenship and as limiting the methods of attaining citizenship to birth in the United States and naturalization in the United States, then such citizens come in by collective naturalization. This seems to be the doctrine of the Wong Kim Ark case, where the court says: " A person born out of the jurisdiction of the United States can only become a citizen by being naturalized either by treaty, as in the case of the annexation of foreign territory; or by the authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals as in the ordinary provisions of the naturalization acts." [18] Hall follows this case and treats this act as coming under the power of Congress to naturalize.[19] Willoughby also treats the acquisition of citizenship by this class of persons as naturalization by act of Congress.[20]

Yet Van Dyne in his *Citizenship* has a chapter on citizenship by birth abroad to American fathers. This is Part I, on Citizenship by Birth. Part II is on Citizenship by Naturalization. In his later book on Naturalization he makes no allusion to acquisition of citizenship by birth abroad to American fathers as a form of naturalization. He evidently still regards this as not naturalization but citizenship by birth. John Bassett Moore in his *International Law Digest* follows the same classification. Citizenship is attained by birth either by right of place or by right of blood.[21] Later he says, " Citizenship may be acquired after birth by naturalization." [22]

The Fourteenth Amendment was adopted nearly a century after the Revolution. Its purpose was not to give an exhaustive definition of the term " natural-born citizens," but to make the freedmen citizens, to secure to them the whole range of civil rights, and to give Congress paramount power to define their rights. The term natural-born citizen had been employed from the beginning in the constitution and the laws. Already the mother country and European continental countries employed the term in the sense both of *jus soli* and *jus sanguinis.* Just as Parliament could pass a law making the children of subjects, born abroad, subjects, so could Congress pass a similar law, and did in the first year of its existence and when composed of the men largely who framed the constitution. The treaty power and the commerce power gave the federal government full and exclusive control over foreign relations. If it is necessary to assign this law to a single power the commerce power is broad enough to authorize it. Such a law may be called a naturalization law, but naturalization means the adoption of an alien and a change of allegiance. By the operation of this law he is born a citizen, but it is recognized that he may be a citizen of the country of his birth at the same time, and so an election is provided for when he arrives at his majority. We conclude that the term natural-born citizen was normally to be defined in the sense of the right of place, but was indefinite enough to admit a meaning corresponding to the usage of nations, as determined by Congress.

6. *Interesting Cases Arising under the Right of Blood*

In 1873 Secretary Fish emphasized the principle that the municipal law of a state had no effect within the bounds of another power. Therefore he " assumed that Congress did not contemplate the conferring of the full rights of citizenship upon the subject of a foreign nation who had not come within our territory, so as to interfere with the just rights of such nation to the government and control of its own subjects." [23] In cases of dual citizenship the country of actual residence has a distinct advantage over the country whose citizen is beyond its jurisdiction. The latter may ask as a favor relief which the former is not bound to grant, but mutual good-will frequently finds a solution in cases of this character.

Nationality is not inherited through women, according to our law. Therefore an illegitimate child born abroad to an American woman is not a citizen of the United States. Neither does an illegitimate child, born abroad, to an American father become a citizen. Louis Rover was born out of wedlock in France in 1888, his father being a native citizen of the United States and his mother a French woman. The parents were afterward married. According to the laws of New York, the native state of the father, the child was legitimated by the marriage of his parents. This brought him under the law of 1855 (Section 1993 of Revised Statutes) and he became a natural-born citizen of the United States several years after his actual birth.[24]

Thus we see that the status of a child born abroad to an American father may depend upon the law of Congress, the law of the state, territory, or district where the father still claims legal residence, and the law of the foreign state where the father is married and the child is born. For example, a child was born in China of an American father and a Chinese mother. Such a marriage was not prohibited by the father's state; the child was born an American citizen.[25]

In May, 1904, the beautiful country seat of Ion Perdicaris near Tangiers was entered by the Moorish bandit, Raisuli, and Mr. Perdicaris, an American citizen, and his step-son, a British subject, were captured and held for ransom. Our government sent a squadron to the Moroccan coast. Finally Mr. Perdicaris was released on payment of $70,000, arranged by our government, acting through the French. The father of Mr. Perdicaris was a native Greek who was educated in America, married to an American woman, and appointed by President Van Buren consul-general at Athens. This Mr. Perdicaris, born abroad to an American father, was described as a millionaire and a citizen who had never resided in the United States. Yet he was given the full protection of an American citizen as was his due.

We have seen that the purpose of the law of 1855 was to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship, yet such communities, organized for religious purposes or business, are often of advantage both to the country in which they are established and to the United States. According to Professor Garner, " An exception to the application of this provision of Section 1993 has until recently been made in the case of children born in distinctively American communities in Turkey, in which citizenship was deemed heritable from generation to generation, regardless of the father's non-residence in the United States. In 1914, however, the Department reversed its previous ruling as laid down since 1887, and held Section 1993 to be universally applicable, without exception."[26] The Great War began in the year 1914, out of which a fierce nationalism has emerged in Turkey which is destroying age-long customs. The old method of dealing with racial and religious minorities, practised even by the greatest sultans, is no longer countenanced and it is futile to insist on its revival.

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[1] United States v. Holliday, 3 Wall. 407.

[2] State v. Manuel, 3 Dev. and Bat. 20 (N. C. 1835).

[3] Scott v. Sanford, 19 How. 393.

[4] See dissenting opinion in U. S. v. Wong Kim Ark, 169 U. S. 649 (1898).

[5] United States v. Wong Kim Ark, 169 U. S. 649. Chief Justice Fuller in his dissenting opinion said: " When, then, children are born in the United States to the subjects of a foreign power, with which it is agreed by treaty that they shall not be naturalized thereby, and as to whom our own law forbids them to be naturalized, such children are not born so subject to the jurisdiction as to become citizens."

[6] Bailey v. Drexel Furniture Co., 259 U. S. 20.

[7] Moore, J. B., *Digest of International Law.* Van Dyne, F., *Citizenship.*

[8] 169 U. S. 649.

[9] Wilson and Tucker, *International Law*, p. 132.

[10] *Ibid.*, p. 131.

[11] *Ibid.*, p. 132.

[12] Gibbons, H. A., *The New Map of Europe*, p. 34. Cleveland, F. A., *American Citizenship*, p. 84.

[13] Cooley's *Blackstone*, Vol. I, Book 1, p. 373.

[14] Van Dyne, F., *op. cit.*, p. 32.

[15] *Ibid.*, p. 32.

[16] *Ibid.*, p. 33. Wilson and Tucker, *op. cit.*, p. 131.

[17] Van Dyne, F., *Naturalization*, p. 440.

[18] 169 U. S. 649.

[19] Hall, J. P., *Constitutional Law*, p. 76.

[20] Willoughby, W. W., *On the Constitution*, Vol. I, p. 284.

[21] Moore, J. B., *op. cit.*, Vol. III, p. 3.

[22] *Ibid.*, Vol. III, p. 289.

[23] *Ibid.*, Vol. III, p. 283.

[24] *Ibid.*, Vol. III, p. 285.

[25] *Ibid.*, Vol. III, p. 287.

[26] Garner, J. W., *Political Science and Government.* Buell, R. L., *International Relations.*

CHAPTER VII

NATURALIZATION BY FORMAL PAPERS

1. *Relation of Citizenship by Birth to Citizenship by Naturalization*

We have seen that in primitive society entrance into the circle of kinship could be effected by birth or adoption. When states developed, entrance was by birth or naturalization. In England besides natural-born subjects and aliens there were denizens, aliens who by letters-patent had received rights that approximated those of subjects. Not many were admitted into full membership in the nation by naturalization. According to Blackstone naturalization could be effected only by act of Parliament.[1] Special acts of this character contained disabling clauses and conditions, usually dispensed with when foreign princes were naturalized. General naturalization acts were passed for the admission of special classes in the colonies. Early in the 19th century naturalization by certificate was introduced in England by act of Parliament as less expensive and tedious than private acts of naturalization, and as late as 1870 a very liberal naturalization act was passed, under which applications are made to the secretary of state and, if supported by satisfactory evidence, certificates are granted.

While naturalization was of little importance to countries thought to be overpopulated it was of great importance to America with a vacant continent inviting settlement. Therefore in the colonial period naturalization acts were passed not only by Parliament for the colonies but by the colonial legislatures, and later by the state legislatures. The power to establish a uniform rule of naturalization was given by the federal constitution to Congress. Thus a uniform rule may regulate naturalization by taking out formal papers, a uniform rule may permit naturalization by naturalization of parent, it may admit groups of persons by collective naturalization, and it is still a uniform rule if it is a special act of Congress admitting an individual to citizenship, since such law is uniformly enforceable in all the states.[2]

2. *Definition of Naturalization*

Though we have been employing the word naturalization in this and earlier chapters it will be conducive of clearer understanding if we attempt a definition at this point. Says Van Dyne, "Naturalization is the act of adopting a foreigner and clothing him with the privileges of a citizen."[3] To this definition, drawn from international usage, we must add enlargements and limitations to make the term conform to our own laws on the subject. Naturalization is, accordingly, also the act of advancing to full citizenship the members of Indian tribes who were previously under the protection of the nation, as its wards, not its citizens, and were held not to be subject to its jurisdiction,[4] and the same full admission of persons who previously were under the jurisdiction of the United States and owed permanent allegiance thereto, but were held not to be citizens thereof.[5] Furthermore limited naturalization must be recognized, whereby certain classes, alien seamen[6] for example, are admitted to citizenship for certain purposes and not for others. Admission to permanent allegiance to the United States without admission to citizenship in the United States may be regarded as another form of limited naturalization. This chapter is to treat not of every form of naturalization or every degree of it, but only of naturalization by formal papers.

3. *Power to Regulate Taken from the States and Given to Congress*

Before 1789 there was great diversity of legislation in the different colonies and states, some conferring all rights of citizenship on foreigners at their landing, others requiring a probation of many years. The constitution, as stated, gave Congress power to establish a uniform rule. The constitution went into operation in 1789, and in 1790 Congress passed an act as authorized. At first the federal courts held that the states still enjoyed a concurrent power over naturalization, when their acts did not contravene the rule established by Congress, but in 1817 Chief Justice Marshall decided in Chirac v. Chirac " that the power of naturalization is exclusively in Congress." [7]

4. *Naturalization Committed by Congress to the Courts as a Judicial Function*

According to Chief Justice Marshall a court in admitting aliens to citizenship receives testimony, compares it with the law, and judges on both law and fact. It enters judgment. These are, therefore, judicial proceedings, and are entitled to the full faith and credit which is guaranteed by Article 4, Section 1, of the Constitution.[8] That admission is by court action may be important where a claim, involving citizenship, is before an international commission, and in other situations, for a judicial determination is given a degree of respect not accorded to decisions of administrative bodies, and is treated as a finality.

But this finality of a judicial judgment may make proper enforcement of the law difficult, for the principle of *res judicata* is that an issue decided by a court of competent jurisdiction is conclusive upon it and all other courts of concurrent power. John Mohammed Ali was erroneously given a certificate of naturalization in a United States district court, but when the government instituted proceedings in the same court to cancel the certificate he claimed the question had been conclusively decided. Judge Tuttle's opinion was at variance with the claim of Ali: " This contention cannot be sustained. It is now settled law that the statutory naturalization proceeding by which an alien seeks the privilege of citizenship is not a judicial adversary proceeding in any true legal sense, and that an order directing the issuance of a certificate of citizenship in such naturalization proceeding is, in essence, not a judgment rendered by a court in a pending suit between adverse parties, and as such final and binding upon said parties as to all matters involved in the suit and decided by the judgment, but is merely a grant, in special proceedings authorized by Congress, of a political privilege conferred by the government upon the petitioning alien purely as a gratuity, and subject to whatever terms and conditions Congress may impose therein, including the right of the government to insist upon a cancellation of such certificate, if found to have been illegally procured." [9]

But the Supreme Court is not in full agreement with this finding of the settled law. In another naturalization case a federal district court denied the petition of an alien to be admitted to citizenship, and he appealed to a circuit court of appeals. The government contended that a naturalization proceeding was not a case in the sense of the law on appeals, and that the naturalization courts had exclusive jurisdiction. The question, on which the circuit courts of appeals were in disagreement, came up to the Supreme Court. Mr. Justice Brandeis spoke for the court. He noted that the function of admitting to citizenship had been conferred exclusively upon the courts since the foundation of our government. If the proceeding were not a judicial case or controversy this delegation of power upon the courts would have been invalid. "Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character." Therefore, the denial of a petition for naturalization being a judicial judgment, it was subject to appeal. It is questionable whether cases like this Tutun case,[10] backed by powerful organizations and able lawyers, involving endless litigation, make any substantial contribution to the efficient enforcement of the federal naturalization policy.

5. *What Courts are Authorized to Naturalize?*

The law of 1790 authorized " any common law court of record in any one of the states " to admit aliens to citizenship. The law of 1906 gives exclusive jurisdiction to federal district courts and " also all courts of record in any state or territory . . . having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited."

Accordingly the great majority of naturalization courts are state courts. State courts may not be compelled to exercise this function, but unless prohibited by state legislation they may perform the function conferred by Congress on them. Van Dyne [11] gives a long list of courts in the various states, both federal and state, that have jurisdiction to naturalize. Often it happens that courts which do not come under the terms of the law, exercise this power, and then it is necessary for Congress to pass acts validating their admissions to date. The writer has found many such cases.

Before the time of President Roosevelt the loose practices of naturalization courts were a travesty upon the decorum and thoroughness which ought to characterize such investigations.[12] Under administrative supervision there has been marked improvement, and the judges ordinarily lean heavily upon the naturalization examiners who prepare the papers and examine the petitioners. In spite of the preliminary preparation by administrative experts the public hearing is perfunctory and unimpressive, and sometimes aliens are admitted against the protest of the examiners.[13] The overburdened judges would gladly be relieved from a service more appropriate for specially trained administrators.

Mr. Justice Brandeis admitted that, " The United States may create rights in individuals against itself, and provide only administrative remedy." [14] Indeed, it is widely recognized that naturalization is essentially an administrative act. The Commissioner of Naturalization, Mr. R. F. Crist, has recommended, " that naturalization be made an administrative function instead of a judicial one, with the right of appeal to the appropriate United States court after an administrative review of an adverse decision in the Bureau of Naturalization." [15]

6. *Functions of the Department of Labor in Naturalization*

Until 1906 Congress did not exercise its power to provide for the effective supervision and control of naturalization which is now placed in the Department of Labor. "The Bureau of Naturalization, under the direction and control of the Secretary of Labor, has charge of all matters concerning the naturalization of aliens, and its duly authorized representatives assist the alien candidate for citizenship in the proper execution of his declaration and petition, cooperate with the judges and clerks of courts exercising naturalization jurisdiction, and officially represent the government, at the final hearing, in all naturalization proceedings." [16]

When aliens come into the country through any of the immigration stations they come under the jurisdiction of the Bureau of Immigration of the Department of Labor. In books of record a registry is made of important information concerning them and to each such alien a certificate of registry is granted, for ultimate presentation to a naturalization court. It is the belief of many, shared by the author, that so long as aliens remain in the country in that status, their registration should be renewed at intervals so that the government may have all pertinent facts concerning them. When they take the first step toward naturalization, they should come under the jurisdiction also of the Bureau of Naturalization, for this bureau has already done a splendid work in preparing candidates for citizenship. This Americanization program is embraced in the regulations of the service: "For the purpose of promoting instruction and training in citizenship responsibilities of aliens, who are applicants for naturalization, district directors of naturalization, within their respective districts, shall freely cooperate with the proper public school authorities and others engaged in such work, and shall cause the Federal Citizenship Textbook published by the Bureau of Naturalization to be distributed to all alien candidates for citizenship who are in attendance upon public schools offering such instruction and training." [17]

7. *What Aliens are Eligible to Citizenship?*

The law of 1790 said, "that any alien, being a free white person, may be admitted to become a citizen." The law of 1870 said, "The naturalization laws are hereby extended to aliens of African nativity and persons of African descent." Revised Statute 2169 now combines these two laws.

Chinese. In spite of these laws some courts admitted Chinese to citizenship, both in New York and New Jersey. A California state court declared such a naturalization to be void, and so did federal courts. To remove all doubt Congress in 1822 passed a law "that hereafter no state court or court of the United States shall admit Chinese to citizenship." [18]

Japanese. Yamashita, a native of Japan, applied in the state of Washington for admission to the bar, and produced an order of a county court admitting him to citizenship, but the court decided that as a native of Japan he was not entitled to become a citizen, and the law of the state precluded the admission of any person not a citizen as an attorney.[19]

While a Japanese does not meet the usual requirement of being a white or a negro may he be admitted under the special provision of the act of 1918 that any alien who has served three years in the military or naval service of the United States, on presentation of the required declaration of intention, may present his petition for naturalization without proof of five years' residence within the United States? Toyota served in the Coast Guard Service substantially all the time from 1913 to 1923, including the period we were at war and received eight or more honorable discharges. The act of 1918 provided that Section 2169 of the Revised Statutes, relating to color of applicants, was not repealed or enlarged " except as specified in the seventh subdivision of this act and under the limitation therein defined." This subdivision related to Filipinos, Porto Ricans, and aliens in the military and naval service of the United States, but the Supreme Court through Mr. Justice Butler decided that the restrictions were relaxed only for the benefit of Filipinos, and that the term " any alien " in the subdivision as in the naturalization laws generally means only whites or negroes. So too a law passed in 1919 that " Any person of foreign birth who served in the military or naval forces of the United States during the present war " should have the benefit of the subdivision described above, was interpreted as limited to whites and negroes, though a considerable number of Japanese and Chinese had enlisted and were admitted to citizenship under what seemed the obvious intention of the law.[20]

Hawaiians. These too were excluded by the general law until by the annexation act of 1900 it was declared that " all persons who were citizens of the Republic of Hawaii on August 12, 1898, are citizens of the United States."

Indians. We have seen that Indians, born in the United States, have been naturalized by a series of laws applying only to them, and not by the general laws on naturalization by taking out formal papers. May therefore Canadian Indians be naturalized? [21] It was decided in an Alaskan case, In re Barton, that an Indian was not a white or a person of African race, and hence was incapable of naturalization.[22]

Mexicans. By various acts of collective naturalization, or by treaties, they have been admitted to American citizenship. Yet it cannot be seen that Mexicans, who are not ethnologically Caucasians or Africans, are eligible to naturalization under our general naturalization statutes because of such admission. Nevertheless, according to Dean Hall,[23] they have been considered white persons. In the case of Rodriguez [24] the court held that Mexicans are embraced in the spirit and intent of our naturalization laws, even if debarred by the strict letter of the law. Mexicans, even when full-blooded Indians, are therefore admitted to naturalization.

Porto Ricans. A federal circuit court decided that a native Porto Rican woman, entering at New York, after the acquisition of the island, was an alien, but the Supreme Court reversed the decision, and held that she was not an alien, and so could not be debarred by the immigration laws, the restrictions of which applied only to aliens.[25] This decision left the people of Porto Rico in an anomalous situation. They were neither citizens of the United States nor aliens. They could not obtain passports because they were not citizens. They could not obtain naturalization, because the laws gave this privilege only to aliens. The passport laws were corrected in their interest in 1902 and the privilege of naturalization was extended to them in 1906. Section 30 reads as follows: " That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law." In 1917 all citizens and natives of Porto Rico were made citizens of the United States, except that any might elect within six months to retain their then-existing status. Even to the few remaining outside the fold another opportunity was given in 1918 to attain American citizenship by military or naval service.

Filipinos. All that was said of the Porto Ricans applied equally to the Filipinos up to and including the law of 1906. Filipinos who took up residence in the United States availed themselves of the apparent privilege granted them and were admitted to citizenship. But while the Porto Ricans are reckoned as whites, the Filipinos are Malays. Was their naturalization subject to cancellation as illegal? The Supreme Court in fact held that the requirements of Section 2169 of the Revised Statutes were still in force, for, said Mr. Justice Butler, " As it has long been the national policy to maintain the distinction of color and race, radical change is not lightly to be deemed to have been intended." Thus was interpreted Section 30 of the law of 1906, but the seventh subdivision of the law of 1918 was interpreted so as to give relief to Filipinos alone. The justice said, " As Filipinos are not aliens, and owe allegiance to the United States, there are strong reasons for relaxing as to them the restrictions. . . . And in view of the policy of Congress to limit the naturalization of aliens to white persons and to those of African nativity, the implied enlargement of Section 2169 should be taken at the minimum." [26] Only those Filipinos may be naturalized who served under the flag. Civilians are barred, unless they can prove their blood European or African. The same rule applies to Samoans and natives of Guam, who likewise owe allegiance to the United States.

Armenians and natives of the Near East. In the case of United States v. Cartozian,[27] decided July 27, 1925, it was held that an Armenian was a white person and entitled to naturalization. The judge considered the opinions of historians and anthropologists from the time of Herodotus to the present and the evidence of Armenians' assimilation. It was shown that over ten thousand had already been naturalized.

In another federal district court, eleven years before, the geographical test, which was rejected in the Cartozian case, was applied, with the result that a Syrian, Dow [28] by name, was denied naturalization because he was not of European descent. Critics say that by the racial test, which " is scientific, and involves consideration of color, language, shape of head and texture of the hair . . . the applicant should have been admitted." It appears that many aliens of the races of the Near East have been naturalized, including Turks, Arabs, and others.

Hindus and East Indians. A Burmese, an educated physician, was denied naturalization by the city court of Albany, N. Y. The court said that though he was not a Chinese, he was a Malay, a subdivision of the Mongolian race, and not a free white or a person of African nativity or descent.[29]

But may a high-caste Hindu, who can fairly prove himself to be either of Indo-European stock or the descendant of Arabian invaders, be admitted as a white person? Ali was admitted to citizenship as a high-caste Hindu, but when the Supreme Court decided in United States v. Bhagat Singh Thind [30] that a high-caste Hindu of full Indian blood, born in the Punjab, was not a white person in the meaning of the law, Ali set up the claim that he was an Arabian of full Arabian blood. Judge Tuttle said: "He admits that his ancestry, like that of other races residing in India, originally sprang from Caspian-Mediterranean stock. It would seem that the most that could be claimed by him, by reason of Arabian ancestry, would be membership in the Caucasian race. This, however, manifestly would avail him nothing, under this decision of the Supreme Court." [31] In the Thind case the point was emphasized that the statute did not employ the word "Caucasian" but the words "white persons," and "these are words of common speech and not of scientific origin." Quoting still the opinion in the Thind case, "The question for determination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute — written in the words of common speech, for common understanding, by unscientific men — in classifying them together in the statutory category as white persons." [32] The basis is then experience, as to whether races are so far different from each other as to prevent ready and natural assimilation. The differences between Europeans and the peoples of the Near East are so slight that all may be reckoned whites, but the differences between Europeans and the other peoples of Asia are so great that the word white may not be applied to these peoples, regardless of their actual origin in a distant past.[33]

8. *Declaration of Intention*

The declaration of intention may be made immediately upon arrival. It must be made at least two years before admission to citizenship. The declaration is valid seven years. "The theory of the law is that one who does not, within seven years, carry out his formally expressed intention, must be deemed to have abandoned such intention, and should be required to begin his probation again. The provision was designed to prevent the abuse of our citizenship by large numbers of aliens who under the old law were enabled to enjoy most of the rights of citizens, including political rights, and who designedly refrained from completing their naturalization that they might avoid military duty and service as jurors." [34]

9. *Rights Conferred by Declaration of Intention*

Under federal laws there are special privileges given to declarants in the granting of homesteads.[35] Under state laws they have special rights in the acquisition of real estate, as in Delaware, Kentucky, New York, and Washington.[36] Declarants have privileges not given to aliens who are ineligible to citizenship, in relation to agricultural lands, in their purchase, leasing, or use, throughout the Pacific coast region. They even have the right to vote in all elections, state and national, in Arkansas, Indiana, Kansas,[37] Missouri, Nebraska, Oregon, South Dakota, Texas, and Wisconsin [38] — nine states. But now in several of these states and some others the future exercise of political privileges by aliens is restricted to those declarants who have already been admitted to the franchise.

Citizenship is not conferred by the declaration. Yet in the case of Bernato,[39] a Mexican resident of Texas who had declared his intention to become a citizen and who was arrested in Mexico, our government interposed in his behalf, but it is admitted that our case was weak. In the celebrated case of Koszta, an Austrian subject who had come to the United States and made his declaration of intention, the declarant went to Turkey on business. He had a pass from our consul at Smyrna stating that he was entitled to American protection. He was arrested by the Austrian authorities and put on board of an Austrian man of war, but the captain of an American war vessel threatened to blow the Austrian vessel out of the water if it attempted to leave port with Koszta. The American captain was sustained by the American Secretary of State, Marcy. Both parties were in the wrong.[40] The Austrians had no right to seize Koszta, and the Americans had no right to threaten force to protect him. Turkey alone had jurisdiction over him. Yet we have a limited right of protection of our declarant in a third country, and so in this case.[41]

Criticism of the declaration. The declaration of intention has been criticized as putting the declarant in the equivocal position throughout a period of years of owing allegiance to his sovereign and yet declaring his intention to renounce that allegiance. A change in our naturalization laws is therefore suggested.[42] When an immigrant comes for the purpose of taking up permanent residence might he not be admitted immediately to nationality but not to citizenship, and later, preferably at the end of twenty-one years, be admitted to full citizenship? His status here would be that of a declarant national and probationer, with the duty to prepare for admission to full citizenship. His status under our domestic law, national and state, being that, in practical effect, of a declarant alien, he would be barred from the exercise of any privilege limited to citizens, such as the manufacture of opium [43] for smoking purposes under federal law, or such as voting, holding office, and jury service in most states. When aliens come with no intention of establishing domicile they would retain their former allegiance.

10. *Petition for Naturalization*

The petition must be duly verified by witnesses who give their affidavit, and it must be accompanied by the certificate of registry, issued by the Bureau of Immigration, and the declaration of intention.

11. *Residence*

Residence means the place of a person's home or domicile. Every change of abode is not regarded as constituting a new residence, in the legal sense of the word, unless it is accompanied with the intention to abandon the former with the purpose of taking up another. According to the Roman law a man's residence was the place where his family dwelt or which he made the chief seat of his affairs and interests. The period required by the law of 1790 was two years; by the law of 1795, five years; of 1798, fourteen years; of 1802, five years, which is still the law. The law of 1906 requires a period of five years' continuous residence. That is more than mere legal residence according to the common law, for continuous residence contains the idea, first, of testing the quality of the applicant and, secondly, of his own training in the principles of American government.

There has been much controversy over the interpretation of the words "continuous residence." An Irishman, Paul [44] by name, who resided in the United States from 1836 to 1844, was refused naturalization because he had stepped off a steamer two or three minutes at Kingston, Canada. It has recently been held that the absence of an applicant in his native country for a period of fifteen months during his mother's illness and death, was not a break in his continuous residence in the sense of the naturalization law.[45] But when another applicant remained abroad fifteen months after the settlement of his father's estate, it was held that this protracted residence was sufficient to preclude his naturalization within five years thereafter.[46] Another alien was absent from this country more than a year of the five-year period, but since its cause was sickness it did not postpone his naturalization.[47] Therefore continuous residence does not mean absolutely uninterrupted bodily presence.

12. *Qualifications as to Age, Education, and Moral Character*

No person can be naturalized under the age of twenty-one years, although there is no express declaration of the law to that effect. An alien is permitted to make his declaration of intention after he has reached the age of eighteen, and so, but for the rule just noted, could be admitted at twenty. He must be able to speak the English language and to sign his petition in his own handwriting. It must be shown that "he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same." [48]

This requirement of good moral character has received careful interpretation in the courts but not always with harmonious results. In 1910 it was held that keeping open a saloon on Sunday in violation of unenforced state law did not show want of good moral character,[49] but in 1919 the exactly opposite was held to be the law.[50] Recently it was held that an alien violating the 18th Amendment was not eligible for naturalization.[51] Again violation of liquor laws before and after naturalization warrants cancellation of certificate for fraud.[52] Where an applicant had been convicted of perjury, and had been pardoned, the court held that while the pardon wiped out the crime, it did not show the petitioner to be of good moral character or to have so behaved in the five years preceding.[53]

13. *Final Hearing and Certificate*

At last, having renounced his foreign allegiance and any hereditary title or order of nobility, he declares on oath that he will support the constitution of the United States and bear true faith and allegiance to the same. His name may be changed, and he is given his certificate of naturalization. The alien immigrant has now passed his five years' probation and is a citizen of the United States and of the state wherein he resides.

[1] Cooley's *Blackstone*, Book I, pp. 373–375. Stephen's *Commentaries*, Vol. I, pp. 440–442.

[2] Case of Nellie Grant Sartoris, Van Dyne, *Naturalization*, pp. 258–260.

[3] *Ibid.*, p. 5.

[4] Act. of June 2, 1924, *Compiled Statutes to 1925*, Sec. 3951aa.

[5] Act of March 2, 1917, *Compiled Statutes to 1918*, Sec. 3803bb.

[6] Thus merchant seamen after declaration of intention are citizens for purposes of protection, and after declaration of intention and three years' service are to be deemed citizens for the purpose of such service, but are not full citizens till after regular admission on petition for naturalization. Act of 1906 as amended by Act of 1918, Sec. 4, Subdivision Eighth. In re Olson, 18 Fed. (2d) 425.

[7] 2 Wheat. 259 (1817).

[8] Spratt v. Spratt, 4 Peters 393.

[9] United States v. Ali, 7 Fed. (2d) 728,730. *American Year Book* for 1925, p. 70.

[10] Tutun v. United States, 270 U. S. 568 (Apr. 12, 1926).

[11] Van Dyne, F., *op. cit.*, pp. 393–506.

[12] Ogg and Ray, *Introduction to American Government*, pp. 186, 187.

[13] State court's grant of citizenship over objection of agent of naturalization bureau may be attacked by government for fraud or illegality. U. S. v. Turlej, 18 Fed. (2d) 435.

[14] Tutun v. United States, See 10.

[15] *American Year Book* for 1926, p. 77.

[16] *Naturalization Rules and Regulations* (Effective May 5, 1924), "Foreword."

[17] *Naturalization Rules and Regulations* (Effective May 5, 1924), Rule 1, Subdivision B, Paragraph 7.

[18] Re Hong Yen Chang, 24 Pac. 156.

[19] In re Yamashita, 70 Pac. 482.

[20] Toyota v. United States, 268 U. S. 402 (May 24, 1925).

[21] Cleveland, F. A. *American Citizenship*, p. 76.

[22] In re Barton, 1 Alaska 111.

[23] Hall, J. P., *Constitutional Law*, p. 75.

[24] Re Rodriguez, 81 Fed. 337.

[25] Gonzoles v. Williams, 192 U. S. 1.

[26] Mr. Justice Butler in Toyota v. U. S., 268 U. S. 402 (1925).

[27] United States v. Cartozian, 6 Fed. (2d) 919.

[28] *American Year Book* for 1914, p. 256. In re Dow, 213 Fed. 355, Apr. 15, 1914.

[29] Re San C. Po, 7 Misc. 471; 28 N. Y. Supp. 383.

[30] United States v. Bhagat Singh Thind, 261 U. S. 204.

[31] United States v. Ali, 7 Fed. (2d) 728.

[32] United States v. Bhagat Singh Thind, 261 U. S. 204.

[33] *American Year Book* for 1925, p. 82.

[34] Van Dyne, F., *op. cit.*, p. 55.

[35] *Compiled Statutes to 1918*, Sec. 4530.

[36] Van Dyne, F., *op. cit.*, p. 64.

[37] In State v. Covell (Kansas 1918), 175 Pac. 989, the court decided that the provision of the constitution giving declarants the suffrage must be interpreted as restricted to alien friends.

[38] Van Dyne, F., *op. cit.*, p. 64.

[39] For. Rel. 1880, p. 777.

[40] Cockburn, *Nationality*, p. 122.

[41] Wilson and Tucker, *op. cit.*, p. 136.

[42] The National Grange urges Congress to provide "that immigration privileges shall be granted to persons who declare their intention of becoming American Citizens, and deportation be made possible of all foreigners who do not carry out such declaration, and who have not taken out naturalization papers after a limited stated period of residence here." Hearing of Senate Committee, Feb. 20, 1923.

[43] *Compiled Statutes to 1918*, Sec. 6287a.

[44] Ex parte Paul, 7 Hill 56.

[45] Petition of Schneider, 19 Fed. (2d) 404.

[46] In re Mayer, 19 Fed. (2d) 530.

[47] Hantzopoulos v. United States, 20 Fed. (2d) 146.

[48] *United States Compiled Statutes to 1918*, Sec. 4352, Subdivision (4).

[49] In re Hopp, 179 Fed. 561.

[50] United States v. Gerstein, 119 N. E. 922.

[51] United States v. Mirsky, 17 Fed (2d) 275.

[52] United States v. Turlej, 18 Fed. (2d) 435.

[53] In re Spencer, 5 Sawyer 195.

CHAPTER VIII

NATURALIZATION WITHOUT FORMAL PAPERS

Review of Naturalization by Formal Papers

Our study has been directed to the usual method by which citizenship is attained by non-citizens, a judicial proceeding, naturalization by taking out formal papers. We have not explored all the complexities of the law, and may have omitted important disqualifications, such as anarchy, in thought or practice, and polygamy, but there has been a deliberate purpose to discuss the outstanding problems and leave to the reader the rewards of his independent excursions in the sources. The naturalization laws [1] not only prescribe the normal procedure, but an abbreviated procedure, still judicial,[2] is also established for alien and Filipino soldiers and sailors, for merchant seamen, and now for women, married to citizens. Resident nationals who are non-citizens may be advanced to full citizenship by formal papers if their race is white or negro. Canadian Indians are not admitted under the general naturalization laws.[3] Besides these laws requiring formal papers, there are other methods of attaining citizenship in which the judgment of a court is not required. Among these we find naturalization by naturalization of parent, naturalization by marriage (a method now abandoned in the United States), and collective naturalization.

I. NATURALIZATION BY NATURALIZATION OF PARENT

1. *Children with Parent at Time of His Naturalization*

Does the naturalization of an alien naturalize his minor children born abroad but residing in the United States at the time of his naturalization? The law of 1795 provided that, "The children of persons duly naturalized, dwelling within the United States, and being under the age of twenty-one years, at the time of such naturalization . . . shall be considered as citizens of the United States."[4] This law was somewhat expanded by the Act of 1802 and survives as Section 2172 of the Revised Statutes. There was some uncertainty as to the meaning of the phrase "dwelling in the United States." A British subject moved to New York in 1823 with his wife and five children where two more were born to him. In 1830 he was naturalized when all his children were still minors. Upon his death the children born in America laid claim to the entire estate on the ground that the children born in England were aliens and could not inherit, but the court decided that all the children were citizens of the United States at the time of his death.[5] Foreign-born minor children who reside in this country at the time their parent is naturalized are thereby themselves naturalized.

2. *Does an Opportune Visit Give Citizenship?*

It was possible till 1907 for a young man to join his father in the United States a week before the father's naturalization and return to his native land a week later an American citizen. Mr. Kasson, minister to Austria-Hungary, was troubled in 1884 by the phrase "dwelling in the United States." Did it mean that children should be considered citizens if they were residing in the United States at the time of their parents' naturalization, or that they should be considered citizens so long as they resided in the United States? He remarked that if the former were the correct interpretation a young man, as above stated, could return to his native land after a brief visit in the United States a full-fledged citizen. Secretary Frelinghuysen made this reply, "That such a thing is possible is a defect in our existing naturalization laws." But he showed that by the opposite interpretation a naturalized citizen might temporarily lose his citizenship by setting foot outside our territory.[6] This anomaly was corrected by the law of 1907, which provides, "That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."[7]

3. *Children Joining Their Parent After His Naturalization*

The statute applies also to children who come to the United States after the parent's naturalization, but before they reach their majority. A subject of Great Britain emigrated to the United States, leaving in Scotland a daughter born there. In 1795 he was naturalized. In 1797 his daughter joined him. The Supreme Court of the United States decided that the naturalization of the father conferred on the daughter the rights of a citizen after her coming to the United States and residing here.[8] In one case a woman came here when she was sixty years old and claimed citizenship by naturalization of her father when she was a minor many years before. A New York court[9] decided that she was a citizen under the provisions of the law of 1802. This case was a doubtful precedent, for it is difficult to see how a woman of her age could be a child dwelling in the United States. At all events Secretary Blaine asserted that it was the traditional policy of the government to hold the law as applicable to children residing in the United States at the time of their parents' naturalization, and to minor children who came to the United States during their minority and while the parents were residing here in the character of citizens.[10]

4. *Children Arriving Here Are Aliens Till Admitted*

Yet such children are still aliens until admitted, and may be debarred if afflicted with a dangerous contagious disease. Charles Zartarian, a Turkish subject, emigrating to America left his wife and two children in Turkey. In 1896 he was naturalized, and in 1904 sent for his wife and children. The Turkish government granted permission to emigrate on condition that they could never return to Turkey. Upon their arrival at Boston, Zartarian's wife and son were admitted, but the daughter, suffering from trachoma, was debarred from landing under the Immigration Act of 1903. The Supreme Court held that the daughter was still an alien, and could become a citizen only by dwelling in the United States, but she was debarred from entry by the action of the authorized officials, and, never having legally landed, of course could not have dwelt within the United States. If this was a harsh application of the law, only Congress could give relief. The plight of the young woman aroused public sympathy because she was barred from returning to her native land, and ports everywhere would be closed to her. Fortunately, before she was deported or Congress took action, her cure was announced.[11]

5. *Children Continuing to Reside Abroad are Aliens*

" Naturalization of the parent in the United States does not confer citizenship on his minor children born abroad before that event and continuing to reside and attain their majority abroad." [12] The father of F. F. Nicklas emigrated to the United States in 1869 and was naturalized in 1884. In 1885 he sent for his son, aged seventeen. The son was arrested and confined in jail. The father appealed to Secretary of State Bayard, but the secretary was obliged to say that young Nicklas could not be considered an American citizen, never having dwelt in the United States.[13] There was a similar case where the son reached his majority before attempting to come to America, and the decision again was that the naturalization of the parent did not confer citizenship upon children born abroad and remaining abroad.[14]

6. *Clarification by Law of 1907*

The Citizenship Commission of 1906 recommended to Congress improvements which were enacted in the law of March 2, 1907. Section 5 prescribes, " That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of . . . the parent: *Provided,* That such naturalization . . . takes place during the minority of such child:

And provided, further, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States." The terms of this law make it no longer possible for the son of a naturalized citizen to attain citizenship by coming to the country just before his father receives final papers and then going back to his native land with the design of escaping military service. No longer can a woman of advanced years at her arrival here claim her naturalization through the naturalization of her father when she was a minor.

II. Naturalization by Marriage

1. *Women and the Doctrine of Perpetual Allegiance*

Naturalization by marriage now has only an historical interest, as women no longer attain citizenship in this way, and yet the vast majority of our naturalized women were naturalized by marriage. The original common law doctrine was that no person could by an act of his own, without the consent of the government, put off his allegiance and become an alien. This was the English doctrine of perpetual allegiance,[15] once widely accepted among the nations. With the common law we inherited this doctrine. Accordingly an alien woman marrying an American citizen was an alien still.[16] Or an American woman marrying an alien was a citizen still. This was altogether different from the rule which is widely accepted on the continent of Europe, namely, that the nationality of a wife follows that of her husband.

2. *Naturalization by Marriage*

Parliament in 1844 declared that any woman married to a subject should be deemed a subject. In 1855 Congress passed a similar act, which as Section 1994 of the Revised Statutes survived until September 22, 1922. It read as follows: "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

This law as first interpreted applied only to alien white women, as only such women could be lawfully naturalized by formal papers. But when the general naturalization law, following the Civil War, had been extended to persons of African nativity or descent, this law was widened correspondingly. In 1888 Congress passed a law that any Indian woman, with certain exceptions, who might thereafter be married to a citizen was declared to become by such marriage a citizen.[17] Therefore before 1922 white women, negro women, and Indian women, with exceptions, married to citizens of the United States, were citizens thereof themselves.

3. *Relation of Residence to Naturalization by Marriage*

There was a degree of uncertainty whether residence in the United States was necessary to confer citizenship upon women of foreign nationality, married to citizens. There were discordant lines of decisions, both courts[18] and executive heads dividing. For example it was decided that a woman who in 1857 married in Ireland a naturalized citizen of the United States, was herself a citizen although she always resided in Ireland.[19] On the other hand in 1896 Secretary Olney expressed the view that the naturalization of a Turkish subject in the United States did not naturalize his wife, who had never been in the United States. At the end of the Great War when many foreign wives of soldiers were entering the country the commissioner of naturalization informed the writer that he regarded them as aliens till they had taken up residence in this country.

4. *Expatriation by Marriage*

Although the law of 1855 provided that an alien woman was naturalized by marriage with a citizen, authorities differed as to the effect of the marriage of an American woman with an alien husband. For example, it was decided in 1877 by Solicitor General Phillips[20] that the marriage of an alien-born woman to a naturalized citizen of the United States conferred on her the permanent status of citizenship, so that when she subsequently married an alien she still retained her American citizenship. The law provided that alien women could become American citizens by marriage, but it did not provide that women who were American citizens could become aliens by marriage to aliens. On the other side Secretary Fish[21] in 1875 decided that the marriage of a female citizen of the United States with a foreigner, the subject of a state by the laws of which marriage conferred nationality, and her removal out of the jurisdiction of the United States, divested her of her native citizenship.

Parliament in 1870 declared that a British woman lost her quality of subject by marriage with an alien. Congress by the law of 1907 laid down a similar rule. Thus the uncertainties of the law were dispelled and both British and American law came into harmony with the almost universal rule that the nationality of the wife is determined by that of her husband.

5. *The Cable Act of 1922*

As a result of the active campaign waged by women voters Congress passed the so-called Cable Act of September 22, 1922. Its provisions have been outlined as follows:

" 1. An American woman citizen does not lose her citizenship upon marriage to an alien. 2. An alien woman does not gain citizenship upon her marriage to a citizen. 3. An alien woman whose husband becomes naturalized after September 22, 1922, does not gain her citizenship through her husband's naturalization. 4. A woman whose husband is not eligible to citizenship, such as a Japanese or Chinese, shall not be naturalized during the continuance of the marriage status."[22] To this brief outline there may be added the explanation that an American woman marrying an alien may formally renounce her citizenship in a naturalization court, and that an alien woman marrying a citizen, or whose husband is naturalized after the passage of this act, is not required to make a declaration of intention and may be naturalized after residence of only one year.[23]

Complaint is made that the act does not give full equality to women, but the greater complaint is that it goes too far. In certain countries, Germany among them, women marrying American citizens lose their native citizenship and do not acquire their husband's citizenship. "Great inconvenience arises under the existing law in cases of foreign women who are married abroad to officials of the United States, particularly those in the diplomatic and consular service." It is proposed therefore by Chairman Johnson of the House Committee on Emigration and Naturalization that "a foreign woman, eligible to naturalization in the United States, shall acquire American nationality without coming to the United States, through her marriage to an American national residing abroad as an official of this government, provided she takes the oath of allegiance to the United States and declares an intention of coming to the United States to reside."[24] The writer suggests that the principle of this bill be extended to the foreign wives of citizens residing temporarily abroad, if the states of such wives automatically expatriate them or permit them to be expatriated on account of their marriage. Some states, France among them, permit wives of aliens to retain their former citizenship if marriage by the law of the husband's state does not naturalize them. It should be a general policy among states to prevent dual citizenship and the loss of all citizenship.[25] The proposition of Congressman Johnson is not understood by the writer as a literal return to naturalization by marriage, but as naturalization by formal papers, issued by the authorized officers of the American government, and taking effect not when the foreign wife of the citizen takes up residence in the United States but when she takes her oath of allegiance and declares her intention as to future residence. The words employed in the proposition of Mr. Johnson indicate the possibility that a limited and not full naturalization was contemplated. If this inference is correct the wife of the citizen, entering the United States as a national, would avail herself of the provisions included in the act of 1906, Section 30, for "the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States."

III. COLLECTIVE NATURALIZATION

Besides naturalization of individual aliens or non-citizen nationals, involving the examination of their qualifications, decision upon their petitions, and issuance of certificates of citizenship, and the naturalization of children by the naturalization of parents, this additional method being dependent indirectly upon naturalization of others by formal papers, "naturalization may be conferred upon certain people in mass or upon particular classes of persons," without the necessity of judicial or administrative action, direct or indirect. "This method of naturalization is called collective naturalization." [26]

1. *Change of Nationality by Conquest or Peaceful Occupation*

It was formerly supposed that conquest was one of the methods by which naturalization could be effected; now it is realized that nationality is transferred by conquest, but citizenship need not be. The same rule must apply to occupation. While allegiance may be thus transferred, it is the custom of nations to permit citizens of the conquered territory either to retain their former nationality or to acquire the nationality of the conquering state.

2. *Collective Naturalization by Treaty*

The United States may acquire territory by treaty, and collective naturalization may or may not be effected, according to the terms of the treaty. "The usage of the world is," according to Chief Justice Marshall, "if a nation is not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." [27] The possible terms stipulated by treaty or imposed by law were almost limitless, subject to conditions that the terms came within the grants to the national government and not within the prohibitions of the constitution.

Notwithstanding the amplitude of the powers of the national government, its practice during the first hundred years of the constitution was very definite and restricted. Beginning with a system of states, territories, and federal district, territory subsequently acquired was assimilated to the existing system, the policy being to organize such acquisitions, as soon as conditions warranted, in inchoate states, known as territories, and when increase of population warranted, to admit them into the union "on an equal footing with the original states in all respects whatever," as stated in the Northwest Ordinance of 1787, reenacted by the Congress of the United States in 1789.[28] The status of aborigines of newly acquired territory was assimilated to that of the Indians of the original states and territories, and the inhabitants of European blood, really so or by legal fiction, were admitted by collective naturalization to full and substantially equal rights of citizenship, yet, in most cases, with the right of election of their previous status.[29]

This uniform policy is illustrated by the series of treaties made from 1794 to 1867, though there is a variety in detail not inconsistent with the general policy. Every treaty of cession to which the United States was a party contained a stipulation for the admission of the inhabitants of the ceded territory as citizens of the United States, either immediately or under certain conditions. In the treaty of 1794 with Great Britain it was agreed that British subjects who resided at Detroit and continued to reside there after evacuation without declaring their intention of remaining British subjects, within a year, became *ipso facto* American citizens. Here was collective naturalization by the self-executory action of a treaty.

The treaty of 1803 with France provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." [30] There was ambiguity here, but when the words were construed in the light of the established system of territories and states, it was possible to interpret the treaty as promising the ultimate admission of the ceded territory to statehood and the immediate admission of the resident citizens of France to American citizenship. The treaty did not contain the usual provision for election of citizenship, and therefore many years subsequently an international commission decided as to French citizens that the treaty "obviously contemplates that they were to be American citizens." [31]

The treaty of 1819 with Spain, ceding Florida to the United States, employed almost the exact terms of the treaty of 1803 with France. In 1828 Chief Justice Marshall decided that, "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." [32]

The treaties of 1848 and 1853 with Mexico provided that Mexicans then established in the ceded territories might elect within a year from the date of exchange of ratifications to retain the title and rights of Mexican citizens, but if they remained in the territories without declaring their intention to retain the character of Mexicans they should "be considered to have elected to become citizens of the United States." [33] Those Mexicans who remained and took no formal action were naturalized by collective naturalization.

The treaty of 1867 with Russia, ceding Alaska, was the last of this series of treaties, in accordance with the uniform policy outlined. This treaty made a distinction between the civilized inhabitants and the uncivilized native tribes. The former could preserve their natural allegiance by returning to Russia within three years, or by remaining they were to be admitted to all the rights of citizenship.[34] "The uncivilized tribes," the treaty reads, "will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country." Under all of these treaties there is not only the transfer of nationality but collective naturalization, the granting of citizenship, not by judgment of a court or examination by administrative officers, but by the self-executing provisions of treaties.

The treaty of 1898 with Spain[35] marked a departure from the policy of the previous one hundred years. Though revolutionary, it was none the less constitutional. Election was given to Spanish subjects who were natives of the Peninsula. They could preserve their allegiance to Spain by declaration within a year. By default they would adopt the nationality of the territory in which they resided. Native inhabitants of the ceded territories were given no election. Their civil rights and political status were to be determined by Congress. Natives of the Peninsula who by default renounced their former allegiance and the native inhabitants of the ceded territories came under the allegiance of the United States, but there was no collective naturalization by treaty. They did not by treaty become citizens.

3. *Collective Naturalization by Act of Congress*

In numerous treaties with Indian tribes there has been collective naturalization, as will be more fully stated in the chapter on Indians, and there have been many acts of Congress, relating to Indian tribes, which were instances of collective naturalization. By the act of March 3, 1843, it was provided, on the partition of the tribal lands among the members, that the Stockbridge tribe of Indians, each and every one of them, were to be deemed citizens of the United States.[36]

A strangely belated act of Congress, passed in 1872, grew out of the previous acquisition of the vast territory of Oregon,[37] the mother of three states, but once jointly occupied by the United States and Great Britain. It was to this effect that, " All persons born in the district of country formerly known as the Territory of Oregon, and subject to the jurisdiction of the United States on the 18th of May, 1872, are citizens in the same manner as if born elsewhere in the United States."

The law of 1900 providing a government for the Territory of Hawaii made all persons who were citizens of the Republic of Hawaii[38] on August 12, 1898, citizens of the United States and citizens of the Territory of Hawaii.

In the chapter on naturalization by formal papers incidental reference was made to the collective naturalization of Porto Ricans in 1917. In 1913 Chairman Jones of the House Committee on Insular Affairs introduced a bill giving the islanders a government more like the typical territorial and state governments of the United States, a step in the wrong direction, but earnestly desired by the people of Porto Rico, as increasing their power. It also proposed to advance their status from mere nationals to citizens of the United States, and this they welcomed as an advance in rank. The measure was before Congress several years before it was successfully enacted into law.[39] This act of March 2, 1917, made all citizens of Porto Rico as defined by the law of 1900 and all natives who had been temporarily absent from the island and so did not come within the terms of that law, citizens of the United States.[40] There were two provisos, however, one, that any such citizen or native of Porto Rico could go before a district court, within six months, and declare his intention not to become a citizen of the United States, and the other, that any person born in the island of an alien parent and permanently residing there might, if of full age, within six months, go before the court and make a sworn declaration of allegiance, becoming thereupon a citizen of the United States, or, if a minor, upon reaching his majority or within a year thereafter, do the same. It will be recalled that natives of the Peninsula were given the privilege by the treaty of peace of electing Spanish allegiance. Apparently the law of *jus sanguinis* is still the law of Porto Rico, and their children, born in the island after the war of 1898, were also citizens of Spain. Now it is possible for such persons and other aliens, born in Porto Rico of alien parents, to acquire American citizenship. In the case of all who were not required to petition a court there was collective naturalization by an act of Congress.

4. *Collective Naturalization by Admission of States*

A recital of established law in Louisiana, made by Mr. Justice Catron in his concurring opinion in the Dred Scott case, may have been *obiter*, yet it was good authority on collective naturalization by admission of states. He said, " The settled doctrine in the state courts of Louisiana is, that a French subject, coming to the Orleans territory after the treaty of 1803 was made and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that Act." [41]

The original constitutions of Ohio and other states of the old Northwest Territory and acts of Congress admitting these states gave full political power to the inhabitants, including not only citizens of the United States but aliens possessing certain qualifications.[42] Congress recognized all these electors who assisted in the framing and adoption of the constitutions as citizens. Such acts of Congress, admitting states, have been regarded as examples of collective naturalization.

The annexation of Texas [43] was effected by joint resolution of Congress in 1845, and all the citizens of the former republic became citizens of the United States.

" The Nebraska [44] enabling act declared that all persons qualified to vote for representatives of the territorial legislature should be eligible to election as members of the convention, and should be entitled to vote upon the acceptance or rejection of the constitution. By the existing laws of the territory, foreigners who had declared an intention to become citizens of the United States were entitled to vote at elections, and this provision was carried into the constitution of the new state, as ratified by Congress. The Supreme Court of the United States held in Boyd v. Nebraska[45] that upon the admission of the state into the Union, all persons of this class became citizens of the United States."

The illustrations of the employment of collective naturalization under three main heads do not give an adequate indication of the frequency of their use, especially of the second and third forms in the order of their descriptions. In treaties and acts which upon their face revealed the purpose to naturalize all members of a class, there has been no great encouragement of enlargement and liberalization by judicial interpretation, although this has sometimes been done as an avowed principle of construction.[46] But in the case of collective naturalization by admission of states, an intention has been read into acts, not clearly present, except in the joint resolution admitting Texas. The naturalization practices of our fathers were so loose and irregular that it was fortunate some means could be found of silently transferring large numbers of aliens who exercised every right of citizenship into the body of citizens, acknowledged as such.

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[1] Act of June 29, 1906, Section 7; *Compiled Statutes to 1918*, Sec. 4363.

[2] The partial naturalization under Act of 1906, amended in 1918, Section 4, Subdivision Eighth, is completed by court action and therefore is not to be considered as naturalization by ministerial act. *Contra* Cleveland, *American Citizenship*, p. 59. In re Olson, 18 Fed. (2d) 425.

[3] Cleveland, in *American Citizenship*, p. 76, notes that a court in Philadelphia recently decided that a Canadian Indian had the same rights of naturalization as one born in the United States. Possibly his reference is to U. S. ex rel. Diablo v. McCandless, 18 Fed (2d) 282, which decided that Canadian Indians are not excluded from entry by the immigration act. The case had no reference to naturalization.

[4] 1 Stat. at L. 414.

[5] West v. West, 8 Paige ch. 432.

[6] For. Rel., 1885, pp. 395, 396. Van Dyne, F., *Naturalization*, pp. 212–215.

[7] Expatriation Act of Mar. 2, 1907, Sec. 5; *Compiled Statutes to 1918*, Sec. 3959 ff.

[8] Campbell v. Gordon, 6 Cranch 176.

[9] Young v. Peck, 21 Wend 389, and 26 Wend 613.

[10] Van Dyne, F., *op. cit.*, p. 213.

[11] 37 Stat. at Large 1221. Zartarian v. Billings, 204 U. S. 170 (1907).

[12] Van Dyne, F., *op. cit.*, p. 216.

[13] Mr. Bayard to Mr. Cole, Nov. 9, 1885, Mss. Dom. Lit.

[14] Case of Charles Drevet, Mr. Bayard to Mr. McLane, July 2, 1885, Mss. Inst. to France, For. Rel. 1885, 373.

[15] Cooley's *Blackstone*, Book I, pp. 369, 370.

[16] Shanks v. Dupont, 3 Peters 242.

[17] *Compiled Statutes to 1918*, Sec. 4104.

[18] Burton v. Burton, 26 How. Pr. 474, holding that residence was necessary.

[19] Kane v. McCarthy, 63 N. C. 299, holding that residence was not necessary.

[20] 15 Ops. Atty. Gen. 599.

[21] For. Rel. 1873 pt. 2, 1187.

[22] *American Year Book* for 1925, p. 651.

[23] *Compiled Statutes to 1925*, Sects. 3961a, 3961b, 4358a, 4358b, 4358c, 4358d.

[24] *American Year Book* for 1926, p. 105.

[25] *American Year Book* for 1925, p. 651.

[26] Van Dyne, F., *op. cit.*, p. 266.

[27] American Insurance Co. v. Canter, 1 Peters 511.

[28] Willoughby, *On the Constitution*, Vol. I, p. 239.

[29] 8 Stat. at L. 116.

[30] 8 Stat. at L. 200.

[31] Moore, J. B., *International Arbitration*, Vol. III, p. 2511.

[32] Same as 27.

[33] 9 Stat. at L. 922.

[34] 15 Stat. at L. 542.

[35] 30 Stat. at L. 1754.

[36] 5 Stat. at L. 645.

[37] Rev. Stat. 1995; *Compiled Statutes to 1918*, Sec. 3949.

[38] 31 Stat. at L. 141; *Compiled Statutes to 1918*, Sec. 3647.

[39] *American Year Book* for 1914, p. 244. *Ibid.*, for 1915, p. 253. *Ibid.*, for 1916, p. 242. *Ibid.*, for 1917, p. 224. *Ibid.*, for 1918, p. 276.

[40] *Compiled Statutes to 1918*, Sec. 3803bb.

[41] 19 How. 393.

[42] Van Dyne, F., *op. cit.*, p. 325.

[43] 5 Stat. at L. 798; 9 Stat. at L. 108.

[44] 13 Stat. at L. 47. Van Dyne, F., *op. cit.*, p. 331.

[45] 143 U. S. 135.

[46] Case of David Levy, Van Dyne, F., *op. cit.*, p. 328.

CHAPTER IX

THE STATUS OF INDIANS

1. *Modification of the Common Law to Meet Conditions in America*

In the preceding chapter we have incidentally written of the Indians, but their place in the development of the law of citizenship is too important to be thus summarily disposed of, and the Indian problem, past and present, is too compelling not to be allotted a chapter in a work of this kind. From first to last Indians who have become citizens have been admitted by naturalization, unless their fathers were citizens at the time of their birth. They have never been admitted solely because they were born within the territorial boundaries of the United States. They were the first exception to the application of the law of the soil.[1] According to accepted theory our ancestors brought over the common law which included applicable statute law of England. The colonial legislatures were permitted to make reasonable changes in the law to meet peculiar conditions in America. Thus the General Assembly of Rhode Island was by charter given legislative power, but limited as follows: "Soe as such lawes, ordinances, and constitutiones, soe made, bee not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this our realme of England, considering the nature and constitutione of the place and people there." [2] As an illustration of the modifications of the comman law to meet conditions in America the differences in the law concerning the fencing of land against cattle may be given. In England a man was responsible for the trespass of his cattle on his neighbor's herbage or corn or trees. The open field system was still common in England, and it was a man's duty to fence in his cattle. But in

America where there were vast stretches of unoccupied land in which cattle might roam and forage, the English custom was reversed. Here the grain fields were ordered enclosed.[3] Quite as truly it was necessary to modify the law to meet the conditions of the presence of savage tribes.

2. *Indian Tribes in the International Sense were Subject to the Jurisdiction of the United States*

The king of England took possession of the Atlantic coast and claimed his right to the interior of the country straight across to the Pacific. After the French and Indian War this modest claim was cut down, and was acknowledged by France and Spain as extending as far as the Mississippi. Over this vast relatively vacant empire the king of England was sovereign. According to the common law all persons who were born in the allegiance of the king were natural-born subjects, with certain exceptions, as the children of ambassadors. Therefore in the international sense the Indian tribes had no standing. They were not recognized as belonging to the family of civilized nations. Their chiefs were not sovereign over a foot of soil. They were subjects of the king of England. Then when the colonies revolted and were recognized as independent states, they acquired the sovereignty over the same vast territory, and the Indians became their subjects. Finally upon the adoption of the federal constitution the Indian tribes became subject to the sovereignty of the United States.

3. *In the Domestic Sense the Indian Tribes were Quasi-Independent*

In the domestic sense, however, the theory of the common law could not be applied to savages. It was quite impossible to regard the Indians as members of the bodies politic which were established by the colonists, for the Indians naturally adhered to their own customs. They were quite incapable of assimilation in their savage state. Therefore from the point of view of domestic law they were looked upon as aliens, and their tribes were dealt with by treaties as if they were foreign nations. Treaties were made with them by the colonies before 1776, then by the states, and after 1789 by the United States. They were regarded as dependent peoples, enjoying quasi-independence.[4]

4. *Their Quasi-Independence Founded Not on Constitutional Right, but on Concession*

Thus in the sense of international law the Indians had no standing. The so-called nations were not recognized as belonging to the family of nations. In the sense of domestic law there was no constitutional guaranty that they should be dealt with as if they were foreign nations and so by treaty. It was merely a matter of concession that the federal laws, operative among them, were in the form of treaties and not in the form of statutes. Finally the anomaly was put to an end by act of Congress in 1871, when it was declared, " No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." [5] The scandal sometimes connected with the ratification of treaties with the Indians may have had some influence upon the change of policy, but the main reason probably was the desire of the lower house to have its full share in legislation. At any rate the relations of the whites and Indians had become so intimate and interwoven that it was no longer seemly that the old custom should be continued. Sometimes laws are passed which become operative only upon Indian acceptance, just as many state laws are passed which are subject to local action. The friends of the Indian were glad to see the pretense of treaty making given up.

5. *The Primary Allegiance of Tribal Indians was to Their Tribes and Not to the United States*

We have seen that the Indians were treated practically as aliens, for the tribes were given semi-independence. Tribal Indians were born in the United States but were not subject to the jurisdiction thereof, since their primary allegiance was to their tribes. They were not natural-born citizens of the United States. They could become citizens only by naturalization, but the general statutes on naturalization did not apply to them. By the law of 1790, "Any alien, being a free white person, may be admitted to become a citizen." By the law of 1870, "The naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." While Indians could not be naturalized by taking out formal papers, they were sometimes naturalized in the early days and later by treaty and sometimes by statute. In the case of the Stockbridge Indians[6] in 1843 every member was naturalized by statute without any further action on his part, and this treatment was accorded other Indians by treaty or statute. In the case of the Winnebago Indians the members of the tribe could make application to a naturalization court and if they gave evidence of fitness they could be declared citizens, and similar provisions were included in treaties and statutes for the naturalization of other tribes. But there was no provision for the naturalization of individual Indians, no matter how convincing the evidence of their fitness. Therefore Elk[7] was refused the right to vote in 1884 for the sole reason that he was an Indian and could not become a citizen under the existing laws. This injustice was corrected three years later, the law of 1887 providing as follows: "Every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens whether said Indian had been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property."[8]

6. *The Progressive Disappearance of Indian Tribal Autonomy and the Assimilation of Tribal Indians Into the Citizen Body of the Nation*

The laws for the automatic naturalization of designated tribes and of isolated Indians who had adopted the habits of civilized life and for the more formal naturalization of applicants who were members of other tribes, were all evidences of the progressive disappearance of Indian tribal autonomy. The law of 1871, already mentioned as prohibiting the further resort to treaties, was a decided step in the same direction. And so was the law of 1885 [9] which gave federal courts jurisdiction over crime committed within reservations by Indians upon Indians. Formerly the Indian tribal governments had jurisdiction alone over such cases. It was claimed on the one hand that Congress had no power to interfere with the internal legal affairs of the tribes still maintaining tribal government, and on the other that the state governments, not the federal, had jurisdiction over the violation of state law within state bounds. But the Supreme Court in United States v. Kagama [10] sustained the law on the ground that the Indian tribes were the wards of the nation. The legislation bearing the name of Senator Dawes marked beyond any other the acceleration of the process. His act of Feb. 8, 1887, provided for the allotment of land to Indians in severalty and for the admission to citizenship of the allottees. Under this act the more advanced rapidly were admitted to citizenship. In 1901 some of the richest per capita bodies politic in the world lost their political autonomy and their membership was absorbed in the citizenry of the Union. Yet as the courts unexpectedly curtailed the powers of the government to protect its citizen Indians, an act was passed May 8, 1906, providing that Indians, not already citizens upon receiving their trust patents, were not to become citizens till they should receive their patents in fee simple, at the end of the twenty-five year period. The same law provided that Indians who had proved their competency could be given their patents in fee simple before the end of the twenty-five year period, and, if not citizens before, they would thereupon become citizens.[11] An act of June 21, 1906, provided for the extension of the trust period of incompetent Indians, and so the postponement of their citizenship.[12] As the Supreme Court reversed its earlier decision on the guardianship over citizen Indians, Congress was able to change its policy without injury to its wards. Accordingly the law of 1919, permitting the naturalization of Indian soldiers and sailors, fittingly recognized the brilliant war record of the American Indians.[13] Finally when two-thirds of the Indians were already citizens and the doors to citizenship were wide open to those who chose to break with their backward tribes, the law of June 2, 1924, was passed automatically naturalizing all of the remaining tribesmen.[14]

7. *The Possessory Title of Indians to the Land Which They Occupied*

So much for the citizenship of Indians and their incorporation with the body of the people, an end advocated by their friends of the Lake Mohonk Conference, but additional explanation must be made of the land titles of the Indians. According to the theory of the English common law the title of all lands was originally in the king. He gave grants to individuals who thus might become tenants in fee simple, possessors of a freehold — owners of the soil, as we would say. So in his American possessions the original title to all lands was in the king. He gave grants to individuals who became owners of the soil, technically tenants in fee simple. The fee in lands not granted remained in the king. After the Revolution the states succeeded to the right of the crown in public lands, not granted to individuals. After the establishment of the federal government the United States was substituted as owner of the western lands to which private title had not been given. Thus all the public lands, with such exceptions as the Western Reserve in Ohio, reserved by the state of Connecticut, by session of the states came under the control of the federal government.

The Indians were not regarded as owners or tenants in fee simple. They had simply a right of occupancy, a possessory title. Yet this title could not be legally taken from them without their consent. As a result of frequent abuses laws were passed limiting the right of purchase of this possessory title to the government itself. "The Indian titles which have been recognized by the government appear to have been (1) the original right of occupancy, and (2) the title to their reservations, which differs in most cases from the original title in the fact that it is derived from the United States. There have been some titles, and a few of them still exist, which the Indian Bureau deems exceptions to this rule, as where the reservation was formed by restricting the original areas or where reservations have been patented to tribes by the government. Examples of the latter class are the patents to the Cherokee, Choctaw, and Creek nations. In a few instances the Indians purchased the lands forming in whole or in part their reservations. The construction given to these by the Indian Bureau and the courts is that they are not titles in fee simple, for they convey no power of alienation except to the United States, neither are they the same as the ordinary title to occupancy; they are 'a base, qualified, or determinable fee,' with a possibility of reversion to the United States only, 'and the authorities of these nations may cut, sell, and dispose of their timber, and may permit mining and grazing, within the limits of their respective tracts, by their own citizens.' The act of March 1, 1889, establishing a United States court in Indian Territory (Oklahoma), repealed all laws having the effect of preventing the Five Civilized Tribes in said Territory (Cherokee, Choctaw, Chickasaw, Creek, and Seminole) from entering into leases or contracts with others than their own citizens for mining coal for a period not exceeding ten years. As a general rule the Indians on a reservation could make no leases of land, sales of standing timber, or grants of mining privileges or rights of way to railways without the authority of Congress. On the other hand, it was obligatory upon the government to prevent any intrusion, trespass, or settlement on the lands of any tribe or nation of Indians unless the tribe or nation had given consent by agreement or treaty." [15]

In the year 1924 about 200,000 Indians had already received allotments totaling approximately 40,000,000 acres of land valued at half a billion dollars. There remained to be allotted about 125,000 Indians with unallotted lands of approximately 35,000,000 acres valued at $75,000,000. At that time practically one-third of the Indians of the United States were no longer wards of the government or under the jurisdiction of the Indian Bureau. Within fifteen years from that time the twenty-five year trust period of a large number of Indian allotments would expire and the jurisdiction of the Indian Bureau would thereafter cease over those Indians unless by reason of incompetency the trust period should be further extended as authorized by law.

Though the Indians throughout the United States have made remarkable progress in agriculture and stock raising, the returns from their oil lands have sometimes brought groups or individuals vast wealth. "The richest producing oil field in the United States is found in the Osage Nation in Oklahoma and belongs to the Osage tribe of Indians. These lands were purchased by the Osages from the Cherokee Indians at a price of $1.25 per acre. . . . The Osages were allotted the surface of the lands and the mineral rights were reserved for the benefit of all the Osage Indians and they share equally in oil royalties and bonuses. Each enrolled Osage Indian . . . [in 1923] received from the government approximately $12,000. . . . The Indians of the Five Civilized Tribes did not reserve the minerals to the tribes when allotments were made. Therefore some Indians have received tremendous sums in royalties from oil production on their lands, while others only received agricultural lands." [16] One Creek Indian was reported to be worth $3,000,000, derived from an allotment arbitrarily assigned to him, since he refused to select an allotment.

The Indians at every period of our history have been the victims of exploitation by designing whites, but the persevering policy of the federal government has been to protect them. To this end an act was passed June 25, 1910, giving the Secretary of the Interior and the Commissioner of Indian Affairs authority to determine the heirs of deceased Indians and to approve or disapprove Indian wills. The Indian Bureau had in 1924 determined the heirs in 35,000 cases involving lands worth $50,000,000. These determinations had been accomplished at a very low cost to the Indians, the average cost per case being $30, less than one-fourth of what it would cost the Indians if their estates had been probated in local courts, as well as a saving to them of large attorney's fees.[17] How large these lootings are " under cover of law " through local jurisdiction, is exposed by the Indian Rights Association. " An example of the present system," cited by the Association, " is afforded in the case of one Indian woman who inherited $100,500, and received $500 after the grafters had administered the estate under the state law." [18] It will be lamentable if the federal government does not retain some degree of guardianship over its former wards, and if the state governments do not recognize that Indians are Indians and give them the special protection of wards of the state.

8. *Exclusive Federal Jurisdiction Over Tribal Indians*

The question of federal and state guardianship over the Indians is closely connected with the exclusive federal jurisdiction over tribal Indians. It was the experience of the colonial period that the individual colonies were quite unable to handle the Indian question satisfactorily. It was necessary for the colonies to act in common, as they repeatedly did in making treaties with the Indians and in making presents to them. Accordingly in 1754 Franklin proposed a common American government, a colonial union under the crown. Among the subjects he would assign to the general government was the control of Indian relations. Later the continental congress and the confederate government under the articles attempted to regulate Indian affairs. Therefore after 1789 the brief words of the federal constitution giving Congress power to regulate commerce with the Indian tribes comprehended, by precedent and the intended meaning, the exclusive jurisdiction over tribal Indians. Yet the federal government did not assume to control small bodies of Indians in the original states which were surrounded by white population. This was left to the states, but it did assume the exclusive control of relations with the Indians in the western wilderness.

In some of these western reservations there was promise of permanent Indian states. The Cherokee nation in Georgia adopted civilized life and many of its members were converted to the Christian religion by devoted missionaries. Georgia was very naturally indignant that a permanent alien community should be built up in its midst, a sovereignty carved out of its sovereignty, thus lessening its territory and limiting its power of growth. The state attempted to exercise authority within the reservation, but the United States Supreme Court denied it the power.[19] The state imprisoned the missionary, Worcester,[20] for residing among the Indians, even though he had the permission of the United States government, when Georgia had forbidden such residence without its leave. Again Chief Justice Marshall decided against the state. But a furious public sentiment arose, shared in and fostered by President Jackson, which compelled this civilized tribe and many other tribes to migrate to the distant west. Some leading Indians and friends of the Indians hoped to establish an Indian state, but the Indians themselves were quite unwilling to give up their tribal autonomy, and the enemies of the Indians were unwilling that a strong, effective Indian state should be erected. With the admission of Oklahoma the possibility of an Indian state disappeared forever.

Many of these Indians are not only possessors of wealth, but are men of splendid force and character. Many have faces that would adorn our coins — men that on the Marne would be superbly brave, but they will die in the poorhouse.

Born in a tribe they cannot stand alone in an economic struggle. The exclusive jurisdiction of the United States government is dependent upon the organization of the Indians in tribes. When the tribes lose their autonomy and cease to be political entities, and the members become citizens of the United States and of the states, the exclusive jurisdiction is lost, but may the tribes not be perpetuated with an attenuated political function, and may not the federal government retain an attenuated guardianship over the persons and property of the Indians? Would not the states possess a concurrent but not paramount power to exercise guardianship over their Indian citizens?

9. *Knotty Problems Connected with Their Passage from Wards of the Nation to Citizens of the States*

The queries with which the last section closed suggest the consideration of some knotty problems. Suppose an unnaturalized Indian traveled with a Wild West Show in Russia when that country was still maintaining neighborly relations with other countries. "The peculiar status of those Indians who have not become citizens," says Willoughby,[21] "is illustrated in the form of a letter of protection issued in lieu of a passport, to those traveling abroad. The following is a letter issued by our consul at Odessa, the form of which has been approved by the State Department: 'To whom it may concern: The bearer of this document is a North American Indian whose name is Hampa. This Indian is a ward of the United States, and is entitled to the protection of its consular and other officials. He is not, however, entitled to a passport, as he is not a citizen of the United States. This consulate has the honor to request the Russian authorities to grant Hampa all necessary protection during his stay in Russia, and to grant him permission to depart when he requires it.'"

Suppose Indian tribal lands have been allotted among the members and they have become citizens of the state, and the state attempts to tax the lands or the permanent improvements. In United States v. Rickert,[22] "It was held that lands allotted in severalty to Indians under the act of 1887, and held in trust for them by the United States for 25 years, are not taxable by the state in which situated; nor are the improvements upon them, or the cattle or other property furnished the allottees by the United States."

Has Congress power to penalize the sale of liquor to an Indian who after allotment of land has become a citizen of a state? In re Hoff [23] the court held that there was no longer federal power to do this, for the government cannot assume the rights of guardianship which it has once abandoned. Distinction is made between property rights and civil and political status. The government could maintain its guardianship over property, still vested in itself, with only a trust patent given to the Indian possessor, but the government could not continue its guardianship over the person of the citizen Indian. This decision was reached by the employment of a mathematical theory of law, utterly divorced from life as it is. This reactionary judgment forced Congress to check its liberal policy toward the Indians lest they should be deprived of necessary protection. But happily the Supreme Court in United States v. Nice [24] held that, "Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection." Previously to this decision and yet later than the regretted decision in the Hoff case the Supreme Court of the United States in the case of Tiger v. Western Improvement Co.[25] held that, "Congress has the right to determine when the guardianship over Indians shall cease and that Congress has at all times the right to enact legislation in the interests of the Indians as a dependent people."

The Indians are no longer a vanishing race; they are increasing and number more than 340,000. It has been truly said that, "No dependent people in the history of the world . . . have made more rapid progress during the last fifty years than the American Indian, and . . . no government during that time . . . has been more generous or more faithful to its trust than has our government toward the American Indian."[26]

[1] Holland, T. E., *The Elements of Jurisprudence*, p. 136.

[2] The Charter of 1663 in Thorpe, F. N., *Constitutions*, Vol. VI, p. 3215.

[3] *The Charters and General Laws of the Colony and Province of Massachusetts Bay*, Chapter XIX, Sec. 3, p. 63, enacted in 1646.

[4] Willoughby, W. W., *The Constitutional Law of the United States*, Vol. I, pp. 294 ff.

[5] *Compiled Statutes to 1918*, Sec. 4034.

[6] Van Dyne, F., *Naturalization*, p. 319.

[7] Elk v. Wilkins, 112 U. S. 94.

[8] *Compiled Statutes to 1918*, Sec. 3951.

[9] 23 Stat. Ch. 341, 363, Sec. 9, 385.

[10] 118 U. S. 375.

[11] *Compiled Statutes to 1918*, Sec. 4195 ff.

[12] *Bulletin 12* (1924), *Office of Indian Affairs, The American Indian and Government Indian Administration*, p. 4.

[13] *Compiled Statutes to 1925*, Sec. 3951a.

[14] *Ibid.*, Sec. 3951aa.

[15] *Bulletin of the Office of Indian Affairs on Indian Land Titles.*

[16] *Bulletin 12* (1924) *op. cit.*

[17] *Ibid.*

[18] Indian Rights Association, *No. 129, Second Series, What shall we do with our Indians?*

[19] The Cherokee Nation v. Ga., 5 Pet. 1.

[20] Worcester v. Ga., 6 Pet. 515.

[21] Willoughby, W. W., *op. cit.*, Vol. I, p. 312.

[22] 188 U. S. 432.

[23] 197 U. S. 488.

[24] 241 U. S. 598.

[25] 221 U. S. 316.

[26] *Bulletin 12* (1924) *op. cit.*

CHAPTER X

EXPATRIATION

1. *Relation of Expatriation to Naturalization*

If naturalization is effected by the joint action of the state which adopts and the alien who is adopted, then logically expatriation is effected by the joint action of the citizen who desires to renounce his allegiance, and his state which permits such renunciation. It was contended at the bar in the early case of Talbot v. Jansen [1] that consent of the state renounced is not necessary, for "the right of expatriation is antecedent and superior to the law of society." According to a later writer,[2] "it is essential to the American doctrine of consent to hold that every citizen shall have a right at any time to expatriate himself." Thus at the threshold of our examination of this subject we encounter two conflicting doctrines, one that naturalization involves a contract which may be terminated only by the consent of both parties, and the other, that, though government is created by contract, the citizen reserves the right to decide whether or not its terms have been observed, and accordingly to gather up his goods and abandon the state as whim prompts or join with other citizens in revolution. One doctrine was inherited from the English common law and the other was born of revolution.

2. *Expatriation in Retrospect*

Perhaps an historical study will point the way to a synthesis of these opposing doctrines. When primitive tribal law began to yield to rules growing out of voluntary association, "and individualistic conceptions began to assert themselves, a man might not wish to make himself responsible for the deeds of his kindred, and, *vice versa*, the kindred might not desire the presence among its members of particularly untrustworthy individuals. The ceremony of renunciation took the symbolic form of breaking sticks over the head of the man who quitted the kindred." [3] Once there had been a time when abandonment of the religious rites of the kindred and disloyalty to the common ancestor brought upon the culprit not fragile sticks but a broken head. Among the Romans there was a destruction of legal personality in part when there was a severance of family ties, when the legal relations with one's kinsfolk on his father's side were broken.[4] This destruction was in greater part when he lost his status of citizenship, as in the case of banishment, and it was complete when he was reduced to slavery, for crime or otherwise. Evidently there was the purpose to stigmatize the loss of status. But in the Greek world with its multitude of tiny independent city-states which were soon over-peopled and thus forced to send out colonies, where men dangerously prominent in their native cities might find it prudent to withdraw or be forced out by ostracism, there was less stigma or none in abandonment, either temporary or permanent, of one's state. "It was easy," therefore for philosophers to show, "that men were not bound to particular spots on the earth, and therefore if a man should happen to find himself in disagreement with the laws or the ideas of his country, he was under no obligation of loyalty to that country." [5] Socrates defends the laws of Athens which had unjustly condemned him to die and makes them speak as follows: "For after having brought you into the world, and nurtured and educated you, and given you and every other citizen a share in every good that we had to give, we further proclaim and give the right to every Athenian, that if he does not like us when he has come of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him; and none of us laws will forbid him or interfere with him." [6] But withdrawal from one's native city and naturalization in another did not imply expatriation, for "the Greeks had no objection to the cumulation of several citizenships in one person."[7] Sometimes cities gave citizenship to all Greeks who dwelt in allied cities, and on this basis created rudimentary forms of federation.

In the middle ages there was a return to the earlier Roman doctrine, according to which a Roman citizen lost his citizenship by emigrating even to a Latin colony.[8] After the death of Charlemagne the great lords seduced each other's vassals away, whereupon this irregularity was prohibited.[9] Thereafter the vassal could not leave his lord, but for the lord's crime, unless the lord freely dismissed him. The law of allegiance is feudal in form, at least. It prescribed that every man must have a sovereign and is bound by his oath of allegiance or by his birth till permitted to renounce his allegiance by his sovereign.[10]

It was asserted in the Talbot v. Jansen[11] case that formerly when the law of perpetual allegiance was the common law of Europe France did not hesitate to admit the subjects of other states and, naturalizing them, raise them to the highest offices, and even England received as an ambassador a subject who had renounced his allegiance to the crown. Poland and Russia, while holding the doctrine of once a subject always a subject, yet naturalized the subjects of other states. In each such case the person who transferred his allegiance did it at his peril, relying on the strength of his new master or the leniency of the old.

3. *Expatriation in the United States in the Absence of a Federal Statute*

But did our law recognize expatriation before there was a federal statute enacted upon the subject? The common law of England included the law of perpetual allegiance. We inherited the common law, with the power to modify it incidentally to meet conditions here. Many state constitutions continued in force previously existing common law and statute law, not repugnant to the new constitutions, subject to repeal. Before the adoption of the federal constitution the legislature of Virginia passed a law providing for expatriation by renunciation in Virginia, but was that law in force after the adoption of the federal constitution, and would renunciation under that law carry with it expatriation from federal citizenship? Would expatriation be permitted in New Jersey and other states where there was no statute on the subject, and, returning to the initial question, could there be expatriation from federal citizenship in the absence of a federal statute on the subject?

In the case of Talbot v. Jansen[12] the United States Supreme Court in 1795 did not find it necessary to answer the question as to the existence of the right of expatriation, because even if such right existed two American captains, who had illegally attempted to take two American vessels into the French service, could not claim it. The court decided that, "If the right of expatriation exist, under our laws, not only a renunciation of citizenship, but an actual removal, for lawful purpose, and the acquisition of a foreign domicile are necessary." Captain Ballard had renounced his citizenship under the Virginia law but he had not acquired a foreign domicile and his removal was not for a lawful purpose. Captain Talbot had taken the oath of allegiance to the republic of France in Guadaloupe, but it was not a removal for a lawful purpose. When we examine the separate opinions of the members of the court, we find that Mr. Justice Paterson did not think that expatriation under the law of Virginia carried with it expatriation from federal citizenship. "The sovereignties are different," he said. Mr. Justice Iredell, a great jurist, disagreed with the doctrine vigorously pressed by the counsel for Talbot that expatriation is a natural, inalienable right in each individual, a right upon which no act of legislation can lawfully be exercised, and that it must be left to every man's will to go off when and in what manner he pleases. On the contrary expatriation in many situations would be improper, especially in time of war, but the right of expatriation "is a reasonable and moral right, which every man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private right ought and must for ever give way . . . But who is to permit it? The legislature, surely." Mr. Justice Paterson also appealed to Congress to pass a law, saying, "A statute of the United States, relative to expatriation, is much wanted." It is a reasonable inference from the language of the members of the court that they favored a guarded right of expatriation, but in the absence of legislation even this conditional right did not exist.

In a later case Chief Justice Marshall refused to discuss the abstract question of this alleged right.[13] But the question came before a court in New Jersey in such form as to demand an answer, and was carried to the Supreme Court of the United States. Coxe,[14] a native of New Jersey, adhered in the Revolution to the British cause, and at the close of the war settled in London. Could he inherit land in New Jersey? The court held that Coxe was incapable of throwing off his allegiance to New Jersey, but retained his capacity to take lands within its limits. This decision was made in the year 1808.

Thus our country was put in the inconsistent position of refusing to recognize the expatriation of our own citizens, and yet insisting stoutly that aliens could expatriate themselves by naturalization under our laws. This same inconsistency had been common formerly in the European countries which held to the law of perpetual allegiance and upon occasion naturalized aliens. There were many advocates of the doctrine of inalienable right, which had been presented at the bar in the Talbot v. Jansen case, and there were sometimes administrative and judicial decisions from this point of view.

4. *A Defective Law upon Expatriation*

Seventy-three years after the court invited Congress to pass a law permitting expatriation, Congress acted. The nature of the law desired and possibly the facts of the case were quite forgotten, but the complaints of our foreign diplomatic agents brought a present demand for action. The law of 1868 was as follows: "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disowned. Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic." [15] In this sophomoric pronunciamento our noble legislators were strangely forgetful of the fact that we had not freely received immigrants from all nations to our citizenship, for our naturalization law at that time admitted only free whites. Congress could not mean that the right was inherent without restriction or impairment,[16] for Congress in 1865 had passed a law making desertion from the army or navy under certain circumstances a forfeiture of citizenship, and at the same time deserters were liable to arrest and punishment. Congress was solicitous only for the expatriation of aliens and made no clear reference to the expatriation of our own citizens. At the most it asserted the existence of the right. It did not set up a standard of renunciation, for Mr. Justice Iredell [17] had said that mere naturalization in a foreign country was not renunciation in our law, just as our bestowal of the right of citizenship upon the Marquis de la Fayette did not absolve him as a subject or citizen of his own country. Congress did not clearly reverse or ratify the decision of the court that expatriation must be for lawful purpose or that a foreign domicile was necessary. The law was most unsatisfactory.

5. *The Deficiencies of the Statute Partially Remedied by Treaties*

Where the law of perpetual allegiance was united with *jus soli,* as in Great Britain, the allegiance of natural-born subjects could not be thrown off without the consent of the sovereign. Where the law of perpetual allegiance was united with *jus sanguinis,* as had formerly been the universal rule on the continent, the allegiance of subjects and their descendants, though the former had been naturalized in the United States and the latter were natives of this country, could be claimed, and could not be thrown off without the consent of the European government. The statute urged the prompt and final disavowal of these claims, and to this end treaties were negotiated with a number of states, beginning with the treaty of 1868 with the North German Confederation.

This treaty stipulates that, "Citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such." [18] There is no right of emigration recognized, so that if one leaves Prussia illegally, and returns, relying upon his American naturalization, his case comes within the provision of the next article: "A naturalized citizen of the one party on return to the territory of the other party remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration; saving, always, the limitation established by the laws of his original country." Therefore in spite of the uncompromising words of the law of 1868 what Secretary of State Everett said in 1853 was quite as true after the ratification of the treaty. He said, "If . . . a Prussian subject . . . chooses to emigrate to a foreign country without obtaining the certificate which alone can discharge him from the obligation of military service, he takes that step at his own risk. He elects to go abroad under the burden of a duty which he owes to his government. His departure is of the nature of an escape from his laws, and if, at any subsequent period, he is indiscreet enough to return to his native country, he cannot complain if those laws are executed to his disadvantage." [19] It should be added that German subjects were liable to military service from the completion of the seventeenth year of age till their forty-fifth year, and that they were liable to arrest and expulsion if they left Germany before the age of seventeen and returned after five years' residence and naturalization in the United States, on the ground that they had left the fatherland to evade military service.[20]

Treaties, recognizing the right of expatriation, were concluded in the year 1868 and years immediately following with many European countries, but France, Italy, and Spain were not among them. There was also a change of opinion in Great Britain so that in 1870 the old common law rule was abandoned, and it was declared that, "any British subject who has at any time before, or may at any time after, the passing of this act, when in any foreign state, and not under any disability, voluntarily becomes naturalized in such state, shall, from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject, and be regarded as an alien." [21] A treaty between Great Britain and the United States was concluded later in the same year, and the provisions of the above law were in substance incorporated, but the words "not under any disability" were strangely omitted. Provision was made for possible renunciation of naturalization before a court or diplomatic officer and notification to either of the contracting parties by the other. Evidently the essential test of expatriation is naturalization according to the laws of the other country, and renunciation in the country renounced is not required, and in most cases not even a notification of such renunciation is contemplated.

Thus the law of 1868 had asserted the right of expatriation, but the treaties of naturalization provided no other procedure for the exercise of this right than the multiple procedure of the laws of other states. Treaties were not made with all states. It was possible for citizens of the United States to practically abandon the performance of every duty of citizenship, to ignore the summons and violate the commands of their government, to withdraw their property and make no contribution to the maintenance of government, and yet in the country of their actual residence claim the privileges and immunities of a citizen of a friendly state and upon occasion to claim the protection of American diplomatic and consular officers.

6. *A New Law on Expatriation and its Provision for Expatriation by Naturalization*

Though the law of 1868 had recognized the right of expatriation, it established no rules by which American citizens could expatriate themselves, and no rules were laid down till the law of 1907 was passed. The first of these new rules standardized the policy of the naturalization treaties and applied it generally. It was enacted that, " Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws." [22]

7. *Expatriation by Taking the Oath of Allegiance to a Foreign State*

The second of these rules added to the words just quoted, " or when he has taken an oath of allegiance to any foreign state." Formerly there was much uncertainty, as when American citizens went to the Hawaiian Islands, before their annexation, or to Liberia, and took an oath of allegiance to the government, without intention of losing their American citizenship. The peculiar relation existing between these countries and the United States suggested the propriety of loaning our citizens as friendly tutors.

8. *Expatriation of Naturalized Citizen by Residence in Foreign Country*

A third rule applies only to naturalized citizens. When such citizens have resided two years in their native country or five years in another foreign country the presumption arises that they have lost their American citizenship. Yet this presumption may be overcome by proof presented to the diplomatic or consular officers of the United States. This rule is plainly not a repetition of the first and second, but a third procedure of expatriation, namely by residence abroad for certain definite periods. The fact of the naturalized citizen's "general abode" in the country for such period creates the presumption of expatriation. This may be overcome by satisfactory evidence, not by his mere assertion that he has not been naturalized or has not taken the oath of allegiance, or his unsupported declaration of intention to return to America, for his declaration may not be believed in view of his prolonged residence. Evidence would be satisfactory that proved that his prolonged sojourn was consistent with American citizenship under the rules and practice of the Department of State. If there is substantial evidence against him the decision of the fact as to his expatriation is left to these officers and the Department of State. They decide not simply on the question of giving him diplomatic protection, or a passport, but they decide upon his expatriation. All this is distinctly stated because a United States District Court has recently decided against each and all of these propositions, and left the law in unspeakable confusion. Assuredly the decision cannot stand.[23]

9. *The Laws of 1906 and 1907 Compared*

These laws supplement each other in their provisions and are not contradictory. The first law provides for the cancellation of certificate on the ground of lack of intention to permanently reside in the United States. The later law provides for voluntary expatriation by residence abroad. The law of 1906 stipulates that the presumption of lack of intention arises if the naturalized citizen goes abroad within five years of his naturalization and takes up permanent residence.[24] The law of 1907 stipulates that the presumption of expatriation arises if the naturalized citizen goes to his native country at any time and remains there two years or goes to any other foreign country and remains there five years. The law of 1906 requires court action to take away his certificate of citizenship. The law of 1907 acts automatically without any judgment of a court in his case, but the naturalized citizen has the privilege of overcoming the presumption against him by the presentation of satisfactory evidence to the diplomatic or consular officer of the United States, who forwards a copy of the same to the department, and another copy to the American embassy or legation in the country where the naturalized citizen resides.

10. *Expatriation of Natural-born Citizen by Birth and Residence in a Foreign Country without Election of American Citizenship*

A fourth rule of expatriation, established by the law of 1907, is still in force.[25] In the chapter upon citizenship by birth abroad to an American father, we saw that there are natural-born citizens under *jus sanguinis*. But suppose that they do not at the age of eighteen years or before they reach their majority declare their intention to become residents and remain citizens of the United States, and do not upon attaining their majority or in a reasonable time thereafter take the oath of allegiance to the United States. They have expatriated themselves by failing to elect American citizenship. We give election to foreign-born children of American fathers; France gives election to native-born children of foreign fathers. The result is that an American child born in France may elect either French or American citizenship, but a French child born in the United States is given no election by either country, but is a citizen of both.

This fourth rule of the law of 1907 created a method of expatriation of a class declared to be citizens by the law of

1855. It left another class, denied citizenship by the law of 1855, in the unfortunate position of being persons with no citizenship whatever.[26] The children of American citizens are in some countries held to be American citizens, and not citizens of the country of their birth. But the law of 1855 denies citizenship to children whose fathers, though American citizens, never resided in the United States. This is not expatriation but denial of citizenship at birth.

11. *Expatriation of Any Citizen by Settling in a Foreign Country without Intention of Return to the United States*

This provision is not found in the law of 1907, but it has been established by the Department of State in the interpretation of the law of 1868, by recognized authorities in international law, and by arbitration commissions.[27] The law of 1868 asserted that the right of expatriation is a natural and inherent right of all people. Natural-born citizens and naturalized citizens must therefore possess it without reference to naturalization abroad, oath of allegiance, and residence for a definite period of years. Acting Secretary Hill in 1901 said: "The position of the Department of State, where an American citizen goes to a foreign country and settles there *animo manendi,* is that he thereby forfeits the right to the protection of this government, and is to be considered as having expatriated himself." [28] A federal court decision is in harmony with this position, with stress upon actual removal from the country and acquisition of a domicile elsewhere as conditions precedent to such expatriation.[29] These are the tests suggested in the Talbot v. Jansen [30] case, on the supposition that the right existed, with the exception that the court in 1795 required that the purpose of the removal must be lawful.

12. *Registration of American Citizens Abroad*

To meet the express duties imposed upon the Department of State and its diplomatic and consular officers by the law of 1907 and their duties with reference to protection of all citizens, the regulations of the department were amended to require that "the principal consular officers should keep at their offices a register of all American citizens residing in their several districts, and will therefore make it known that such a register is kept and invite all resident Americans to cause their names to be entered therein." Full data, including the reasons for foreign residence, are required. Certificates of registration are issued for one year only, then destroyed, and new ones issued only if it is clearly shown that the residence abroad has not assumed a permanent character.[31]

13. *When Expatriation is not Accomplished*

If a naturalized citizen can establish the following facts the presumption of his expatriation is overcome: (a) That his residence abroad is as a representative of American trade; or, (b) That it is for reasons of health or education; or, (c) That some unforseen or controlling exigency has prevented his carrying out his intention to return to the United States. A specific instruction of Secretary Elihu Root [32] must be noted: "The evidence required to overcome the presumption must be of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient."

While natural-born citizens are not under the burden of overcoming a presumption against them after a residence of a certain number of years, yet they, like naturalized citizens, lose their citizenship if they establish themselves in a foreign country without definite intention to return to the United States. Therefore these tests are also applied to them. If they can show that their residence abroad is due to ill health or financial condition, or that they are agents of American enterprises, or are missionaries, the presumption of abandonment of nationality by long residence is overcome very much as in the case of naturalized citizens.[33]

While various laws have been passed penalizing desertion from the army and navy by forfeiture of rights of citizenship, expatriation is not necessarily effected by foreign enlistment unless there is renunciation of American citizenship or foreign citizenship is conferred by the enlistment.[34]

Though it has been held that expatriation is effected by accepting employment in the diplomatic service of a foreign government, the same rule has not been applied to consular appointments. American citizens have often served in that capacity without loss of their status, even naturalized citizens serving their country of origin.[35]

When one accepts civil service in a foreign country a presumption arises that he does not intend to retain his American citizenship. Yet when an oath of allegiance is not required, as was formerly the case in Samoa, the person accepting civil service may still be regarded as an American citizen.[36]

14. *The Proposed Synthesis Formulated*

We may now attempt to harmonize the sharply conflicting doctrines which were presented at the bar in the case of Talbot v. Jansen. There is a natural right in any man to go anywhere in the world to attain his best, but it is not superior to the law of society. There is a natural right in his state, one of self preservation, which is superior to the right of the individual. Society must decide on the necessity of its exercise. The individual's right is then suspended. There is a close relation between emigration and expatriation. What is implied in the former becomes actual in the latter, " the voluntary renunciation or abandonment of nationality and allegiance." [37] Counsel on both sides in the early case, referred to, agreed that the right of expatriation was suspended when the nation is at war. The law of 1907 stipulates, " That no American citizen shall be allowed to expatriate himself when his country is at war." [38] Compelling necessity may be other than war. Congress is the judge.

[1] 3 Dallas 131 (1795).

[2] Sharwood's *Blackstone's Commentaries*, Vol. I, p. 47, Note 11.

[3] Vinogradoff, P., *Historical Jurisprudence*, Vol. I, "Tribal Law," p. 318.

[4] Sohm's *Institutes of Roman Law*, Ledlie, pp. 178, 179.

[5] Vinogradoff, P., *Historical Jurisprudence*, Vol. II, "The Greek City," p. 28.

[6] Plato's *Crito*.

[7] Vinogradoff, P., *op. cit.*, Vol. II, pp. 117, 118.

[8] Sohm, R., *op. cit.*, p. 180.

[9] Woolsey, T. D., "Feudal System," Johnson's *Cyclopedia*, Vol. III, p. 340.

[10] Stephen's *Commentaries*, Vol. II, p. 433.

[11] Same as 1.

[12] *Ibid.*

[13] Chacun v. 89 Bales of Cocheneal, 1 Brock 478.

[14] M'Ilvain v. Coxe's Lessee, 2 Cranch 280 (1808).

[15] R. S. Sec. 1999; *Compiled Statutes to 1918*, Sec. 3955.

[16] Cleveland's *American Citizenship*, p. 88. *Compiled Statutes to 1918*, Sec. 3952.

[17] Same as 1.

[18] Van Dyne, F., *Naturalization*, p. 466.

[19] Moore, J. B., *Digest of International Law*, Vol. III, p. 568, Sec. 436.

[20] Van Dyne, F., *op. cit.*, p. 394.

[21] *Ibid.*, pp. 335, 336.

[22] *Compiled Statutes to 1918*, Sec. 3959.

[23] United States v. Eliasen, 11 Fed. (2d) 785, Mar. 24, 1926. It must be noted that previously the law had been weakened by decisions as follows: U. S. v. Howe, 231 Fed. 546; Banning v. Penrose, 255 Fed. 159; Sinjen v. Miller, 281 Fed. 889.

[24] For law of 1906 see *Compiled Statutes to 1918*, Sec. 4374. For law of 1907 see *Compiled Statutes to 1918*, Sec. 3959.

[25] *Compiled Statutes to 1918*, Sec. 3963.

[26] *Ibid.*, Sec. 3947. Cleveland, F. A., *American Citizenship*, p. 84: "It is possible for a person to be a homeless one at birth, as in the case of a son born in Russia to an American father who had never been in the United States."

[27] 2 Wheaton's *International Law Digest*, 450. 3 Moore's *International Arbitration*, 2565.

[28] Van Dyne, *op. cit.*, p. 349. *Contra*, Cleveland, *American Citizenship*, p. 85.

[29] Comitis v. Parkerson, 56 Fed. 556 (1893).

[30] Same as 1.

[31] Van Dyne, F., *op. cit.*, pp. 352–355.

[32] *Ibid.*, pp. 341–343.

[33] *Ibid.*, pp. 355–357.

[34] 3 Moore's *International Law Digest*, 734.

[35] *Ibid.*, p. 716.

[36] *Ibid.*, p. 718.

[37] The definition of Van Dyne, *Naturalization*, p. 333.

[38] *Compiled Statutes to 1918*, Sec. 3959.

CHAPTER XI

PRIVATE CORPORATIONS

1. *Full Citizens and Partial Citizens*

We have treated of natural-born citizens under the law of the soil and under the law of blood. We have treated of naturalized citizens, naturalized by formal papers, by naturalization of parent, by marriage, and by various forms of collective naturalization. The status of American Indians has been of such interest and importance that we have treated of them under the general head of naturalization since this has been the method of their admission to the body of our citizens. Incidentally as a digression we have turned aside to expatriation as the loss of citizenship. The several chapters have dealt with full citizenship, but there is a class of persons reckoned as possessing partial citizenship, namely private corporations, which at the present time is more in the public eye than any other particular class which has engaged our study. President Butler of Columbia University has said that, "The limited liability corporation is the greatest single discovery of modern times."[1] The study of business corporations involves the study of corporations in general and even associations in general. Therefore we will treat of private corporations, public corporations, and public-service corporations. Then from corporations which are citizens in part we will pass on to persons who owe permanent allegiance to the United States but are not citizens thereof, namely, non-citizen nationals, and finally the status of one more class will require our study, persons who owe temporary allegiance to the United States and are certainly not its citizens, but are aliens.

2. *Definition of Corporations and of Private Corporations Especially*

Though the problem of the corporation has been presented by an eminent American judge[2] as the dominating one of our generation comparable to the slavery question the solution of which was thrust upon a preceding generation, it must be noted that every statement of historical fact,[3] made by one investigator in this field, is challenged by another of equal weight, and every statement of principle, formulated in the attempted solution of the problem, is denied by another, equally sincere in placing upon a rational foundation one of the most necessary agencies of modern industrial activity. This diversity of view appears even in the definitions of corporations employed by various authorities.

Chief Justice Marshall in deciding Dartmouth College v. Woodward said: " A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." [4] This definition was founded on the doctrine of Lord Coke, but that doctrine in some of its most characteristic features, as restated by Marshall, was repudiated by Kyd[5] who wrote exhaustively on corporations at the end of the eighteenth century and later by the famous Sir Frederick Pollock.[6] It was, nevertheless, long the orthodox English and American doctrine and is expressed by Judge Simeon E. Baldwin as follows: " A private corporation may be defined as an association of persons to whom the sovereign has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract, and sue and be sued, and who have accepted the offer and effected an organization, in substantial conformity with its terms." [7]

From an historical study of corporations, traced through the ages, John P. Davis arrives at a definition which emphasizes the social and public benefits which are derived from corporations even when established primarily for the profit of the members. He says: " A corporation is a body of persons upon whom the state has conferred such voluntarily accepted but compulsorily maintained relations to one another and to all others as an autonomous, self-sufficient, and self-renewing body they may determine and enforce their common will, and in the pursuit of their private interest may exercise more efficiently social functions both specially conducive to public welfare and most appropriately exercised by associated persons." [8]

Finally the author attempts to formulate a definition based upon the conclusions of very respectable authorities in this field, conclusions which express the tendency of our time. A private corporation may be defined, accordingly, from three points of view. First, though not properly described as an artificial person,[9] it is a real entity,[10] with many of the attributes of an individual natural person, and therefore, as being in a large degree distinct from its members, is more properly described as a juristic person; [11] secondly, it is in its usual forms just as truly a collective person, an association of persons, natural and possibly juristic, and therefore when justice demands the law will go back of the juristic personality and protect or hold liable the members; [12] and thirdly, a private corporation is a form of organization, a method of doing business,[13] so necessary to the persons voluntarily incorporated, and to society in general,[14] that it should be regarded not as a creation of the state of origin, but of its members [15] in the exercise of a moral right, the state of origin registering [16] the corporation in accordance with general rules adopted for the safeguard of public policy, and other states recognizing [17] it under similar rules adopted for similar protection. While such a corporation is usually an association of persons, holding membership simultaneously, it may be a succession [18] of persons with only one member at a time, and it may be a fund [19] regarded in law as a person.

3. *The History of Corporations*

(1) *In the Roman Empire*

The ancient family group was considered a permanent body enduring forever, the representative of which was the *pater familias.*[20] Families developed into tribes and states which also were collective entities with rights and duties. They were personified. Yet private law [21] developed for the determination and regulation of the relations of heads of families to each other, and these higher public organizations were outside the domain of private law. When the Roman republic had given place to the empire, municipalities were permitted to rank as persons capable of private rights and duties.[22] This was found so mutually convenient to cities and their citizens that the imperial treasury, the fiscus, was given proprietary capacity as if a private person, though with restrictions in favor of the government. In the same period groups of persons sought to be recognized as lawful associations with proprietary capacity after the example of the cities. Thus, declares Sohm, Roman law discovered the notion of a collective person, distinguished from its members, ranking as a person subject to private law, having proprietary capacity, and standing on the same footing as private persons.[23]

While the Romans invented the corporation, yet they looked upon all corporations as being primarily public institutions. A corporation in Roman law was an organized body of persons governing themselves.[24] The Romans of the imperial period felt that there was danger in such organizations — danger in any association of men. The right of association did not exist under the empire. The only legal associations were those regarded as creatures of the state.[25] Even the burial associations of the early Christians must have been in this sense a part of the governmental system, for otherwise they would have been illicit societies. The vast extent of the Catacombs proves the associations which built them to have been legal.[26] Corporations do not appear, as a rule, to have been separately chartered.[27] On the other hand associations, not already legally existing, were with increasing reluctance created by special or general enactments. As the law of corporations developed in content and expanded in its range of application, these associations, as primarily public institutions, were given proprietary capacity like private persons, finally even to the extent of receiving bequests,[28] and their property was considered absolutely distinct from the property of the members. It was almost like a pious fund, dedicated to social purposes.[29]

The Romans did not carry their invention of the corporation to the business corporation as we know it. The very insistence upon the distinct personality of the corporation, its public character, and the exclusive corporate ownership of its property would delay if not prevent such a development. Yet they employed the new idea in many ways, and the germ of the commercial corporation was suggested in the guilds of blacksmiths [30] and other crafts which were organizations for the mutual benefit of the members and the public. The guild could regulate but the members operated on their separate accounts.[31] There was not yet the conception that corporate property was at the same time the individual property of the members, owned individually according to the number of shares of each member. The idea of the corporation was therefore not that a public association could own property,[32] but that it could own it according to the rules of private law and thereby the association become a corporation.[33] The Romans thought of the corporation as a fictitious person given a capacity under the private law which formerly had been restricted to natural persons.

(2) *In Germany*

After the fall of Rome almost the only surviving corporations in the west were those connected with the church. Guilds, it is true, existed everywhere, and in the north especially they became the agencies of reviving democracy and civilization. As Germany at first developed the corporate idea in relative independence, later surrendered under university influence to Roman law, and still later combined Roman principles with revived Teutonic principles, solving the problem of the corporation with greater success than any other country, it is appropriate that we should review the development of German corporation law.

The German *sib* [34] was like the Roman *gens* in that it was a union of kinsfolk, reckoned only on the father's side.

Land was assigned to the *sib* for common cultivation which ripened into ownership. Here was the corporate idea, the collective ownership of property.[35] The *sib* disintegrated. Householders became owners of land. Groups of householders, based on kinship or vicinage, became mark-associations or village communities.[36] The members owned land individually, and the association owned land which had not yet passed into private ownership, but the members held an interest in these commons.[37] Here were collective ownership and the collective inherence of rights and duties. These and similar bodies, like natural persons, had the capacity of right-doing and wrong-doing, and so were subject to secular and ecclesiastical punishment, like their members who shared in the common weal and woe.[38]

As land passed into private ownership and the village communities developed into political communes, some of these communes became important centers of trade and industry. The merchant and craft guilds [39] were organized in them, sometimes as the very foundation of the municipal government, as was the case in Florence,[40] Italy, and as occurred on all the trade routes of western Europe. These guilds were bodies of men making laws and executing them, owning property and managing it, in their own interest and in the public interest as well. They were self-created,[41] sometimes wresting the recognition of their privileges from their feudal lords, and sometimes, on the other hand, endowed by the public authorities with delegated powers of great economic and social importance.[42] Guilds were more in the nature of public corporations than of private business corporations of to-day. Communities of the collective hand [43] suggested certain features of the later business corporation. The name indicated that all the members clasped hands and came to decision by unanimous vote. They were primitive partnerships. The members retained their individual ownership of their shares in the common property. In this they were like our business corporations. The combination of the conception of corporate property and individual ownership of shares in that property gives us the basic notion of private business corporations.[44]

This development and the working out of various forms of organization to meet the needs of modern life were delayed by the reception of the Roman law in the 16th century.[45] It was a period of absolutism in government, and the Roman doctrine that an association receiving corporate powers was a creature of the sovereign,[46] was eagerly seized in its modern form that a corporation is an artificial person created by a charter granted by the sovereign.

In the 19th century historical investigation and the consciousness of business needs brought a revival of older conceptions.[47] Said Gierke: " What man is he owes to association among men." Corporate personality was claimed to be just as real as individual personality. Collective ownership is probably older than individual ownership. In an industrial age of vastly increased population and interdependence between states, a great variety of organization is necessary to efficiently meet the needs of society. The individual often achieves his ends best by self-directed effort, but sometimes by joining with another or others in partnership. This relation takes many forms, and shades into the corporate relation. The German " civil code no longer knows a *persona ficta,*" but concedes to juristic persons capacity not merely for holding property, but for action, even delictual capacity.[48] The Germans have not quite reached the goal of free association attained by the English[49] and Swiss,[50] but they protect against the abuse of corporate powers more successfully than the Americans or even the English.[51]

An individual mercantile trader whose business exceeds the limits of a small trade must enter his trade name in the Mercantile Register under the control of the court. Its entry is published in the Gazette. His trade name is generally his own, but there is provision against misleading impressions.[52] Yet anyone acquiring[53] an existing trade name and business may continue under that name, provided the agreement is registered and published, and he assumes the obligations of his predecessor. He sues and is sued under his trade name. Very full information is required upon the constitution of any mercantile partnership,[54] and this is true of commandite partnerships [55] in which one or more partners have limited liability. They, like individual traders, are registered. Firms sue and are sued under their trade names. Limited partnerships [56] "are endowed with corporate rights without being required to comply with the complicated formalities prescribed in the case of . . . share companies." They, like small traders, do not come under the commercial code. In limited partnerships all the partners have limited liability, but in commandite companies [57] certain shareholders are personally liable to an unlimited extent for the debts of the company. Yet such companies are juristic persons and have much the same elaborate organization of share companies.[58] Finally share companies are characterized by the limited liability of the shareholders. These companies are incorporated by registration in the Mercantile Register. They, of course, are juristic persons. Judge Grosscup highly commends the German regulation of business corporations as giving security to investors in stock and stimulating the instinctive desire to own.[59]

(3) *In England*

The English were a Teutonic people who never received the Roman law in substitution of their own common law. Yet there was a continuous injection of the Roman law, particularly in the early time through the church.[60] The ancestry of modern private corporations may be traced back to the medieval guilds.[61] They were established for religious, charitable, and fraternal purposes. A guild created to maintain a bridge was likely to take the name of a saint. Whatever their specific purpose they often combined with it the general purposes first named. As trade and industry revived merchant [62] and craft guilds [63] were formed, the latter sometimes by secession from the former. These guilds were self-created corporations,[64] but they felt safer if higher authorities gave them documentary recognition of their rights.[65] The doctrine grew up that the king alone could create a corporation, but when no charter could be produced the corporate character was said to have been acquired by prescription or by the common law, or by any method grounded on the fiction that the king had in some past time granted a charter.[66] The guilds owned property but their function was not to engage in business but to regulate the business of the members. When business expansion at the beginning of the 17th century invited the creation of great organizations of merchants trading in foreign parts, the guilds contributed the general form of such companies.[67] At the first they were regulated companies,[68] so like the guilds that they did not themselves, as companies, engage in trade. They regulated the operations of the members for their common protection. Sometimes the companies owned the facilities of trade, such as ships and so-called factories abroad. Sometimes a group within the company joined in a single venture and issued shares of temporary validity. Experiment took many forms, influenced, no doubt, by Italian methods [69] of combining capital employed in foreign trade. The three charters of the East India Company [70] show the stages by which a regulated company developed into a joint-stock company. The many companies of that period exercised governmental powers in the territories where they operated and were regarded as public enterprises, though in the main privately financed and directed. The result was that nearly all sooner or later surrendered their charters; the Hudson's Bay Company [71] alone of them survives, stripped of its vast territorial and governmental powers. So great was the reaction of public opinion against corporations for business purposes, occasioned by the South Sea Bubble [72] at the beginning of the 18th century, that the granting of charters was looked upon with extreme disfavor. Yet toward the close of the century resort to corporate organization increased.[73]

There was freedom of association down to the French Revolution, and soon thereafter the rules for registered societies became liberal.[74] Most companies, organized for business, were therefore not corporations but partnerships with unlimited liability. Great business undertakings of a quasi-public nature sought incorporation with monopolistic privileges. The weight of evidence seems to be that these corporations, though primarily liable for their debts, involved their shareholders in liability in case the companies became insolvent.[75] Shareholders could be compelled by court action to contribute from their private fortunes by assessments. It was felt that commerce was seriously hampered, and to meet its needs many acts were passed, aimed to encourage investment and yet to give reasonable protection to all parties concerned. The Companies Acts [76] provided that any seven or more persons by registration could form themselves into an incorporated company with or without limited liability. The right of association [77] had long been established; now the right of incorporation was equally recognized. This was the accomplishment of the 19th century.[78]

(4) *In the United States*

A number of the colonies were established by English chartered trading companies, but could a corporation make a corporation unless by explicit grant in its own charter? [79] There was no such grant in the Massachusetts Bay charter, yet the general court gave a charter to Harvard College [80] in 1650. That their partisans were then in possession of the government at home emboldened the colony to assert this power. Connecticut after the restoration of the Stuarts was afraid to incorporate Yale College [81] till the year 1745 when the power to incorporate was more generally recognized. The charter to Penn empowered him to incorporate cities and boroughs, but before leaving home he incorporated the Free Society of Traders in Pennsylvania [82] (1682). There was one other colonial business charter granted in Pennsylvania, the Philadelphia Contributionship for Insuring Houses from Loss by Fire [83] (1768), and that alone of colonial business corporations still exists. There were not more than six in all the colonies. There were seven municipal corporations in the 17th century and twice as many in the 18th,[84] but of what we now call private corporations not for profit there were ecclesiastical corporations,[85] both aggregate and sole, civil corporations, such as the Penn Charter School, and eleemosynary corporations, such as the Pennsylvania Hospital,[86] founded in 1751. It may be doubted that such corporations were thought of as private, for the classifications then in use did not make this distinction.[87] On the contrary it was felt that the corporate organization, even when in the form of a joint-stock company, was only for great public undertakings, fostered by government, and beyond the ability of individuals and small groups. During the later colonial period there was an increase of unincorporated associations for banking, insurance, Indian trade, and manufacturing. They were partnerships or tenancies-in-common.[88]

Independence opened a new chapter. During the war there was the first charter granted to a bank. The Bank of North America [89] at Philadelphia was chartered by Congress under the Confederation in 1781, and also by Pennsylvania and Delaware. As a bank of issue it was given monopolistic privileges during the continuance of the war. It still exists, but after the conclusion of the war and especially after the adoption of the federal constitution there was a bancomania — a furor in the multiplication of banks, and many business corporations were created. There was so much speculation in United States stock, and in the shares of incorporated and unincorporated companies that men of sober thought, like John Adams, were alarmed.[90] The New York Stock Exchange was chartered in 1792.[91] The Ohio and Scioto [92] companies were unincorporated associations to which Congress sold vast tracts of land in exchange for government stock to be delivered in successive installments, but the securities rose so enormously that the companies could not meet their obligations. One of the great manufacturing corporations of the time was chartered by New Jersey, the Society for Establishing Useful Manufacturies.[93] Its manifold purposes included the building of the town of Paterson, the harnessing of water power, and the resort to eminent domain in canal construction. The purpose was partly charitable, and to aid the company a lottery was established. The state subscribed to its stock. The corporation weathered every storm, and still exists, but in the panic which ended the furor of speculation the leading promoter of this corporation and of the land companies, became a bankrupt and died in prison a debtor.

After the panic of 1792 there was an hostility to corporations similar to the feeling in England after the South Sea Bubble.[94] But President Monroe vetoed national internal improvements. The states took up the task, and failed. So the development in a large way fell to private corporations. North Carolina [95] was the first state since the days of imperial Rome to offer incorporation by a general law. Formerly in the British Empire and in the United States business corporations had been created by special acts of the legislature, although the still older method was the king's charter.[96] Now a movement gradually spread over the country the doctrine of which was that charters should be granted not by special favor but freely to all who met reasonable requirements. This doctrine particularly was applicable to ordinary business enterprises and generally to the franchise *to be* as distinguished from the franchise *to do*. Then about 1840 private corporations under liberal laws undertook the development of internal improvements, such as railroads. About 1870 began railroad consolidation and industrial combination, when in course of time Mr. Harriman died in control of 70,000 miles of railroad and the United States Steel Corporation had a billion and a half of dollars in stocks and bonds.[97]

The feeling toward corporate organization appears to have oscillated between feverish encouragement and blind repression. States and their subdivisions pledged their credit to public utilities and private manufacturies and afterward sought legislative and judicial annulment of their contracts.[98] The general laws on corporations in the states were often expressions of the prejudice against corporations, and even if carefully drafted to protect the people from corporate abuse, the burdens put upon this form of organization were often unreasonable. On the pretense that corporations were artificial persons, without a soul, the mere creatures of the state, unjust tax burdens were often put upon them, and the ordinary rights of citizenship and personality were withheld from them. This legislation was based on the doctrine that it is the function of government to protect the people from fraud and even from their own improvidence.[99] The Blue Sky Laws are enacted from this point of view. Another view of government as related to most subjects was held formerly, and that view began to be applied to corporations. It was that the sole function of government is to keep the peace, and that people should learn to make wise investments by their mistakes.[100] Accordingly some states enacted laws, liberal or loose, on what may be termed the personal law of corporations, that is, the law related to their creation and internal government. This new legislation was apt to give inadequate protection to the investing public and to persons who might become creditors of the company so originating. Yet the fees and prospective taxes on the corporate franchise were relatively low, made so to attract business men from other states to the bargain counters and thus bring a continuous, though modest, tribute from such companies actually doing their business outside the state of origin. Judge Grosscup[101] told of such a New Jersey corporation which was brought into his federal court in Chicago as a bankrupt after an existence of only three or four months. It had been chartered for forty million dollars, afterward reduced to two million and a half, on paper, but when it was wound up it had liabilities of one hundred thousand and assets of only twenty-five thousand. Even then New Jersey presented a claim, as preferred debt, for eighteen thousand dollars, the amount of her capital stock tax, leaving a balance for distribution of seven thousand. He charged that New Jersey in the laxity of her laws was a party to the fraud. While there was reform in New Jersey under Governor Wilson, that and other states, holding the same position, have been joined by New York and many others in the passing of liberal corporation laws. Business was entitled to standardized corporation laws. It was doubtful that there was power in Congress. Therefore the effort has been made through uniform state legislation. After years of study the Commissioners on Uniform State Laws submitted to the state legislatures such a bill in 1928.[102]

4. *A Corporation a Juristic Person*

The history of corporations has been given in some detail in the thought that principles might be drawn from it almost as necessary deductions, not requiring extended discussion. It is often said that an individual human being is a person by nature but a corporation is a person by creation of the sovereign. But millions of persons by nature have not been persons in law. Although it is a principle of modern law that every human being is a person, this principle was established not by a change in nature but by a change in law.[103] *Persona,* [104] as a status, is attained by legal recognition. In Scotch and continental law generally a firm or commercial partnership is a *persona;* this is not true of Anglo-American law though an equivalent protection is given. Firms are created by the parties, and recognized and protected by the state.[105] So too parties "enter into written articles of incorporation," and "file the same with some public officer," who certifies to the existence of the corporation under the law.[106] This may be traditionally the act of a sovereign bestowing privileges by his will and pleasure, special grace, certain knowledge, and mere motion, as affirmed by Charles II in the Rhode Island charter, but it is more rationally described as the recognition of juristic personality which is created by the parties in the exercise of a right of incorporation.

A corporation being a person, it has attributes [107] generally belonging to personality, with such limitations and additions as are appropriate to its purposes. A corporation is like a natural person in that it is an individual separate and distinct from other persons, even its members. Its individuality is recognized by courts of law unless an unusual state of fact requires that this attribute be disregarded. Like a natural person it has a name, but so may have firms and unincorporated associations, which also have, but in less degree, protection in the use of their names. Under its name it may sue and be sued, like an individual,[108] but in Germany firms may sue under their trade names, and Abbot [109] claims there is no reason why American courts should not give the same privilege to firms here. Under its name it may make contracts, and perform other acts like natural persons, but so may firms, unincorporated as they are. A corporation under its name may purchase lands and hold them; a firm purchases in the names of its members, but by contract it may attain almost the simplicity of corporate ownership. A corporation has a common seal, just as formerly was the custom of natural persons. Now this privilege of corporations is often a handicap, and concessions are made to the necessities of business. It may make by-laws for the better government of the corporation, but this privilege belongs to all associations. There is also the attribute of perpetual succession, now restricted to the term prescribed for the corporate existence, but even this privilege with a limit in years may be obtained by mere contract without incorporation. These are the attributes named by Blackstone,[110] and all but the last belong to natural persons as individuals, and all to natural persons associated for common ends. It is an unfortunate inheritance from the reigns of despots that corporate attributes should be considered special privileges granted by the state. They are the natural and necessary rights of corporations or of persons so organizing.

5. *A Corporation an Association of Persons*

A corporation is a person and just as truly an association of persons. The mask, the *persona,* will be torn away when justice demands.[111] This, however, will not be done lightly, and so there are cases in which the courts see only the juristic personality where minds not habituated to judicial ruts would look to the persons associated. Accordingly Professor Wormser[112] approves the decision of a British court, upholding the right of a British corporation to compel the registration of one of its vessels, against the contention of the government that the majority of the stockholders were aliens. The law forbade the registration of any vessel owned by foreigners in whole or in part, directly or indirectly. The court held that, "In no legal sense are the individual members the owners." A New York street car company owned a subsidiary which was unable to pay a judgment for damages. A state court held the parent company was not liable. The same reviewer was not quite sure that this decision was correct.[113] An Alabama court decided that a hardware company was distinct from its members who for a consideration had sold their business and right to engage in it. The members, in the view of the court, were not engaged in the business and had not violated their contract, for the company which they organized was alone engaged in the business.[114] This the reviewer roundly criticized, declaring that: "The policy of the law as administered in progressive courts is to regard substance and to disregard form." Then he quotes from a Minnesota case that, "where the corporate form is used by individuals for the purpose of evading the law, as for the perpetration of fraud, the courts will not permit the legal entity to be interposed so as to defeat justice."[115]

This principle is not restricted to attempted frauds upon third parties by persons who seek to hide behind the distinct personality of the corporation; it applies also to suits by shareholders against directors for refusing to resist the payment of a tax levied against the corporation under an invalid ordinance. So too where one corporation is organized by the officers and stockholders of another corporation, making their interests identical, the courts may treat them as identical, if justice requires.[116]

6. *A Corporation a Method of Doing Business*

The third point in the author's definition of a private corporation was that it is a form of organization, a method of doing business. A New York judge declared that a corporation is not a personality, a reality, or a fiction, but "is more nearly a method than a thing," and is merely "a name for a useful and usual collection of jural relations." [117] In our historical review we have seen that a developed commercial and industrial state requires great variety of business organization. In several of these forms limitation of liability is an essential factor, and it is this which in the last half century has contributed more than the historic attributes of corporations to the marvelous expansion of corporate activity and correspondingly to the increased well-being of the countries resorting to this method of doing business. Nevertheless as late as the time of Mr. Justice Miller he could say: "It is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain." [118] This declaration could not be made to-day. Of course limited liability is not essential to corporate organization, but it is essential to the success of corporations in great business undertakings.

Limited liability was developed in Italy [119] in the late middle ages when Italy led the world in business activity and wealth. If an active man of affairs needed capital for ventures in trade, he found a partner who risked a definite amount on condition of a certain division of profits and no additional liability. This form of partnership was known as the *commenda,* the risk of the commendator being limited to his definite contribution and the risk of the active partner being unlimited. This is similar to our limited partnership and the German commandite partnership.[120] Limited partnerships are authorized by laws of states which favor them, but in absence of such laws essential limitation may be attained by contract between the partners and by contracts with all persons who deal with the firm.[121] The same may be said of joint-stock associations whether created by contract or under laws which permit and regulate them.[122] They are midway[123] between partnerships and corporations. But as many courts find no such intermediate forms[124] of organization, the power to contract and create an unincorporated association under trust deed[125] is employed with the purpose to obtain the advantages of corporate organization and at the same time escape the hostile and unfair legislation which weighs heavily upon corporations.[126] In fine we repeat that limited liability is the outstanding factor in the corporate method of business. Without limited liability investors would fear the loss not only of the definite sum staked but of larger sums by assessment, even their all.[127] Few would invest. Without capital in substantial amount bonds and bank loans would be insecure, and a breath of suspicion might ruin the most prosperous business.[128] Limited liability is a business necessity.

7. *A Corporation a Citizen in a Limited Sense*

In the interpretation of the constitution and laws of the United States the courts have given a limited recognition to corporations as citizens and persons. This is in accordance with the original intention of their institution, and should be carried to full development in the interest of justice. It was the very purpose of corporations to give to citizens thus organized the full proprietary protection of individual citizens.[129] It was the very purpose of the great trading companies of the 17th century to assure the members, individually and collectively, full protection in foreign parts.[130] Business does not stop at state boundaries. It is often said that laws of states have no force outside their jurisdiction, but this is not true. Conflict of Laws[131] shows that many laws have extraterritorial enforcement. This is especially true of contracts. A partnership is created by contract, sometimes between citizens of different states, and does business without reference to state lines. The contract and the law under which it is made are interpreted and enforced by other states, with modification, it may be, imposed by the policy of the states in which judicial cases arise. A corporation is equally created by contract, made under the law of the state of origin, which controls the organization and capacity of the new juristic person [132] but not the public policy of other states or their moral standards. Citizens of states, either individually or collectively, would seem therefore to have a moral and constitutional right to enter other states and do business, subject to the laws of the states entered, when such laws do not violate the supreme law of the land.

Chief Justice Marshall [133] said, however, that a corporation aggregate is not a citizen. If this were true they would not be citizens in the sense of Article III, Section 2: " The judicial power shall extend to all cases . . . between citizens of different states." The courts at first adopted the theory thus laid down by the chief justice, but by a legal fiction they corrected what would otherwise have been accounted a very serious omission of the framers. " Until about 1840 . . . the doctrine prevailed that a corporation being an artificial unit, the court would look behind its corporate personality to see whether the individuals of which it was composed were, each and every one of them, citizens of a state different from that of each of the parties sued. But in later cases this doctrine was repudiated, and the principle stated, first, that the citizenship of the individuals composing the corporation is to be presumed to be that of the state by which the company was chartered, and, still later, that this presumption is one that may not be rebutted." [134] Thus in practice a corporation is a citizen of the state giving the charter for the purpose of suing or being sued in a federal court, even when it is sued by one of its own stockholders residing in another state. Thus by a series of leaps from fiction to fiction the courts finally reached firm ground, giving procedural protection to corporations as citizens. But in view of the original and universal purpose of corporations to give them as collective persons the protection of individual persons, it is necessary to interpret the term " citizens " as including corporations.

If corporations are citizens of the states of origin in their right to sue and be sued in federal courts, why are they not citizens in the sense of Article IV, Section 2: " The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states "? The answer is given by Willoughby: " Inasmuch as a corporation is the mere creature of local law, the courts declare it can have no legal existence, or right to do business, beyond the limits of the sovereignty by which it is created. In other words, the interstate comity clause of the federal constitution does not necessitate the recognition by the several states of corporations created by any of the other states." [135] Let us examine the results of this construction. A law of Tennessee giving citizens of that state priority of claim against a bankrupt company, formerly doing business in the state, over the claims of citizens of other states against the same bankrupt, was declared invalid under the comity clause. But a corporation of Virginia could not have parity of claim with a citizen of Ohio, because the aforesaid law was valid in its discrimination against the Virginia corporation but invalid in its discrimination against the Ohio citizen.[136] Is not this decision plainly an injustice to the citizens of Virginia and other states who were associated as members of the corporation, chartered in Virginia? Or is it not a wrongful discrimination against a particular method of doing business which is recognized as legitimate everywhere? Or is it not the denial of a real entity, a juristic person, which is created to do business without reference to state lines, and as a subject of right should be held to be a citizen of Virginia in the intention of the framers?

The courts, though sharply criticized for their interpretation of the comity clause, are to be commended for giving a broad interpretation to the word " person " in the due process [137] and equal protection clauses of the 14th Amendment, though the primary intention of Congress was to protect the freedmen.[138] But the protection of the equality clause should be greatly extended. The New York courts held that a resident of the state, holding stock in an Indiana corporation, should not be taxed on his shares as they were only evidence of interest in property existing outside the jurisdiction.[139] This decision is worthy of all praise, and should be followed generally throughout the country. When a legislature imposes a franchise tax or a privilege tax upon a corporation which has no possible relation to the cost of the service rendered to the corporation or to the public in preventing corporate abuses, but is simply a device to produce revenue, it is a violation of the equal protection clause, whether the tax is regarded as paid by the company or its stockholders.[140] When a tax is imposed on corporate property not imposed on property in general, except in lieu of the general property tax, or when both the company and its stockholders are taxed, the former on the capital stock and the latter on their shares, the same clause is violated.[141] Mere pieces of paper should not be taxed as if they were wealth, when they are mere evidences of wealth, conveniences in doing business.[142] It is not asserted that the courts have adopted these principles, but they face in that direction.

A broader interpretation of the citizenship clause of the 14th Amendment is also desirable.[143] It was possible and highly proper to so interpret this clause as intended to assure citizenship to the freedmen but not to deny the existence of other citizens besides those born and naturalized in the United States, particularly citizens born abroad and corporations created in the United States, or it was equally possible to interpret the clause as extending citizenship to corporations as subjects of right originating in the United States.[144] Congress passed a law authorizing the payment of " claims for property of citizens of the United States " which had suffered from Indian depredations. The federal courts interpreted the law as giving relief to corporations, holding them to be citizens in the intention of the law. The first treaty with Great Britain, as interpreted, gave the same property protection to corporations as to natural persons. A Spanish corporation in Porto Rico was held to become an American citizen under the treaty of peace. The courts sometimes correct omissions in constitutions and statutes by interpretation. It is proper that they so apply the general principles of law and the general spirit of the constitution as to recognize corporations originating in the United States as citizens thereof to such extent as their nature permits. In any event it would still be partial citizenship.

[1] Wormser, I. M., *Disregard of Corporate Fiction*, p. 2.

[2] Grosscup, Hon. Peter S., *Michigan Bar Association for 1908*, p. 46.

[3] Lindsay, Hon. Wm., *Virginia Bar Association for 1908*, p. 203.

[4] Marshall, John, 4 Wheat. 518 (1819).

[5] Kyd, Stewart, *A Treatise on the Law of Corporations* (1793), p. 15. Freund, Ernst, *The Legal Nature of Corporations*, p. 10.

[6] Wormser, I. M., *op. cit.*, p. 3.

[7] Wilgus, H. La F., *Private Corporations, American Law and Procedure*, Vol. VIII, p. 83.

[8] Davis, John P., *Corporations*, Vol. I, p. 34.

[9] Young, E. H., *Foreign Companies and Other Corporations*, p. 215. Freund, E., *op. cit.*, pp. 49, 73. Sohm, R., *The Institutes*, p. 193, Note.

[10] Freund, E., *op. cit.*, pp. 13, 40, 47, 75.

[11] Sohm, R., *op. cit.*, p. 161.

[12] Wormser, I. M., *op. cit.*, p. 9. Conyngton, T., and Bennett, R. J., *Corporation Procedure*, p. 18.

[13] Wormser, I. M., *op. cit.*, p. 5. Wood, W. A., *Modern Business Corporations*, p. VIII.

[14] Young, E. H., *op. cit.*, p. 13.

[15] Young, E. H., *op. cit.*, p. 51.

[16] Stephen's *Commentaries*, Vol. III, p. 17.

[17] Young, E. H., *op. cit.*, p. 10.

[18] Stephen's *Com.*, Vol. III, p. 2.

[19] Sohm, R., *op. cit.*, pp. 196 ff. Schuster, E. J., *The Principles of German Civil Law*, p. 41.

[20] Morey, W. C., *Outlines of Roman Law*, p. 5.

[21] Sohm, R., *op. cit.*, p. 25.

[22] *Ibid.*, p. 186. Morey, W. C., *op. cit.*, pp. 264 ff.

[23] Sohm, R., *op. cit.*, p. 192.

[24] *Ibid.*, p. 195.

[25] *Ibid.*, p. 198.

[26] Schaff, P., *History of the Christian Church*, Vol. II, pp. 289 ff.

[27] Sohm, R., *op. cit.*, p. 199: "Lawful Societies were entitled to hold corporate property by virtue of a general rule of law . . . no express grant of juristic personality." Cooley's *Blackstone*, Book I, p. 472.

[28] Sandars, T. C., *The Institutes of Justinian*, p. 169.

[29] Sohm, R., *op. cit.*, p. 198.

[30] Williston, S., "The History of the Law of Business Corporations," in *Select Essays in Anglo-American Legal History*, Vol. III, p. 197.

[31] *Ibid.*, p. 197.

[32] In the distinction between public and sacred property on the one hand

and private property on the other there was from the earliest times the basic idea of the corporation, collective ownership.

[33] Sohm, R., *op. cit.*, p. 188.

[34] Huebner, R., *A History of German Private Law*, pp. 11 ff.

[35] *Ibid.*, p. 115.

[36] *Ibid.*, pp. 116 ff.

[37] *Ibid.*, p. 118.

[38] *Ibid.*, p. 149.

[39] *Ibid.*, pp. 128 ff.

[40] Villari, P., *The Two First Centuries of Florentine History*, p. 126.

[41] Huebner, R., *op. cit.*, pp. 129, 130.

[42] *Ibid.*, pp. 129, 131.

[43] *Ibid.*, pp. 139 ff.

[44] *Ibid.*, pp. 145, 150.

[45] *Ibid.*, pp. 151 ff.

[46] *Ibid.*, pp. 155 ff.

[47] *Ibid.*, pp. 156 ff. Sohm, R., *op. cit.*, pp. 186–203. Schuster, E. J., *p. cit.*, pp. 32–57.

[48] Huebner, R., *op. cit.*, p. 158. Sohm, R., *op. cit.*, p. 219.

[49] Huebner, R., *op. cit.*, p. 158.

[50] *Ibid.*, p. 159.

[51] *Proceedings of the Michigan State Bar Association for 1908*, p. 62.

[52] Schuster, E. J., *op. cit.*, pp. 24 ff. Schuster, A. F., *German Commercial Code*, p. 8.

[53] *Ibid.*, p. 10.

[54] *Ibid.*, pp. 42 ff.

[55] Schuster, E. J., *op. cit.*, p. 50. Schuster, A. F., *op. cit.*, p. 65, who calls it limited partnership.

[56] Schuster, E. J., *op. cit.*, p. 45. Freund, E., *op. cit.*, p. 29.

[57] Schuster, A. F., *op. cit.*, p. 153.

[58] *Ibid.*, p. 71.

[59] Grosscup, P. S., *op. cit.*, p. 62.

[60] Davis, J. P., *op. cit.*, pp. 35 ff.

[61] *Ibid.*, pp. 130 ff. Williston, S., *op. cit.*, p. 198.

[62] Davis, J. P., *op. cit.*, p. 148.

[63] *Ibid.*, p. 167.

[64] Carr, C. T., "Early Forms of Corporation," *Select Essays in Anglo-American Legal History*, Vol. III, p. 181: "The gild was the grand example of voluntary association." Williston, S., *op. cit.*, p. 205. Smith, T., *Tradition of the Old Crown House*, p. 28. Smith, T., *English Gilds*, p. xxii: "Charters . . . do not incorporate. They merely record."

[65] Williston, S., *op. cit.*, pp. 199, 205.

[66] Smith, T., *op. cit.*, p. xxiii.

[67] *Ibid.*, p. cii. Davis, J. P., *op. cit.*, Vol. I, pp. 168, 177, 178, 209; Vol. II, p. 66. Williston, S., *op. cit.*, p. 199.

[68] *Ibid.*, p. 199. Davis, J. P., *op. cit.*, Vol. II, pp. 66, 79, 85 ff.

[69] Young, E. H., *op. cit.*, p. 2. Mitchell, Wm., "Early Forms of Partnership," *Select Essays in Anglo-American Legal History*, Vol. III, p. 194.

[70] Davis, J. P., *op. cit.*, Vol. II, pp. 114 ff. Williston, S., *op. cit.*, pp. 199 ff.

[71] *Ibid.*, p. 200. Davis, J. P., *op. cit.*, Vol. II, pp. 110, 111, 114, 127, 129, 131, 200.

[72] Williston, S., *op. cit.*, p. 202.

[73] *Ibid.*, p. 203.

[74] Stephen's *Commentaries*, Vol. III, pp. 119 ff.

[75] Williston, S., *op. cit.*, pp. 229 ff.

[76] Stephen's *Commentaries*, Vol. III, pp. 16 ff.

[77] Huebner, R., *op. cit.*, p. 158.

[78] Stephen's *Commentaries*, Vol. III, pp. 16 ff.

[79] Davis, J. S., *Essays on the Earlier History of American Corporations*, p. 8.

[80] *Ibid.*, p. 14.

[81] *Ibid.*, p. 14. Baldwin, S. E., "History of the Law of Private Corporations in the Colonies and States," *Select Essays in Anglo-American Legal History*, Vol. III, p. 242.

[82] Davis, J. S., *op. cit.*, p. 41.

[83] *Ibid.*, p. 87.

[84] *Ibid.*, p. 54.

[85] Baldwin, S. E., *op. cit.*, p. 248.

[86] Bolles, A. S., *Pennsylvania*, Vol. II, p. 299.

[87] Cooley's *Blackstone*, Book I, p. 469.

[88] Davis, J. S., *op. cit.*, p. 91.

[89] Williston, S., *op. cit.*, p. 234. Bolles, A. S., *op. cit.*, Vol. II, p. 220. Baldwin, S. E., *op. cit.*, p. 253.

[90] Davis, J. S., *op. cit.*, p. 288.

[91] *Ibid.*, p. 278.

[92] *Ibid.*, pp. 137 ff.

[93] *Ibid.*, pp. 271 ff.

[94] Baldwin, S. E., *op. cit.*, pp. 249 ff.

[95] *Ibid.*, p. 255: gives the credit to New York, followed by Delaware and Pennsylvania. Wood, W. A., *op. cit.*, p. viii.

[96] Baldwin, S. E., *op. cit.*, p. 249.

[97] Wilgus, H. L., *op. cit.*, p. 96.

[98] Loan Association v. Topeka, 20 Wall. 655 (1874).

[99] Wood, W. A., *op. cit.*, p. 8.

[100] *Ibid.*, p. 8.

[101] *Michigan Bar Association for 1908*, p. 54.

[102] Handbook of the National Conference on Uniform State Law and Proceedings of the 38th Annual Meeting (1928), pp. 344 ff.

[103] Sohm, R., *op. cit.*, p. 164.

[104] Morey, W. C., *op. cit.*, p. 230.

[105] Gilmore, E. A., "Partnership," *American Law and Procedure*, Vol. VIII, pp. 12 ff.

[106] Wilgus, H. L., *op. cit.*, p. 130.

[107] Williston, S., *op. cit.*, p. 208.

[108] Gross Coal Co. v. Rose, 126 Wis. 24.

[109] Abbot, E. V., *Justice and the Modern Law*, pp. 94 ff.

[110] Cooley's *Blackstone*, Book I, p. 475.

[111] Wilgus, H. L., *op. cit.*, p. 101.

[112] Wormser, I. M., *op. cit.*, p. 16. Queen v. Arnoud, 9 Q. B. (Adol. & El., New Series), 806 (1846).

[113] *Ibid.*, p. 21. Berkey v. Third Ave. Ry. Co., 244 N. Y. 84.

[114] *Ibid.*, p. 24. Moore & H. H., Co. v. Towers Hardware Co., 87 Ala. 206.

[115] Erickson v. Revere Elevator Co., 110 Minn. 443.

[116] United States v. Milwaukee Refrig. Co., 142 Fed. 247.

[117] Wormser, I. M., *op. cit.*, p. 5. Farmers' Loan & Trust Co. v. Pierson, 130 Misc. Rep. 110.

[118] Liverpool Ins. Co. v. Miss., 10 Wall. 566.

[119] Mitchell, Wm., *op. cit.*, p. 186.

[120] Schuster, A. F., *op. cit.*, p. 65, who calls it limited partnership.

[121] Wormser, I. M., *op. cit.*, pp. 107, 113.

[122] *Ibid.*, pp. 106, 113. Wood, W. A., *op. cit.*, p. 412; Articles of the Pierce-Fordyce Oil Association.

[123] Wormser, I. M., *op. cit.*, p. 101.

[124] Wood, W. A., *op. cit.*, p. 417.

[125] *Ibid.*, p. 417.

[126] *Ibid.*, p. 420: The Agreement and Declaration of Trust of the North American Companies as Unincorporated Associations.

[127] Abbot, E. V., *op. cit.*, pp. 98 ff.

[128] *Michigan Bar Association for 1908*, p. 51.

[129] Poste, E., *Gaii Institutionum*, p. 142.

[130] Davis, J. P., *op. cit.*, Vol. I, p. 111.

[131] Henicksman, F. W., "Conflict of Laws," *American Law and Procedure*, Vol. IX, p. 304.

[132] Masury v. Arkansas National Bank, 87 Fed. 381.

[133] Bank of United States v. Deveaux, 5 Cranch 61 (1809).

[134] Willoughby, W. W., *On the Constitution*, Vol. II, pp. 984, 985.

[135] *Ibid.*, Vol. I, p. 218.

[136] Blake v. McClung, 172 U. S. 239 (1898).

[137] Railroad Tax Cases, 13 Fed. 758.

[138] Quaker City Cab Co. v. Pa., 277 U. S. 376 (1928).

[139] Wood, W. A., *op. cit.*, p. 240.

[140] *Ibid.*, p. 212. Hall, J. P., *Constitutional Law*, p. 293 (*Contra*).

[141] *Ibid.*, p. 160 (*Contra*). Wood, W. A., *op. cit.*, p. 240.

[142] *Ibid.*, pp. 212, 239, 240, 247. Hall, J. P., *op. cit.*, pp. 191–198 (*Contra*). Wilgus, H. L., *op. cit.*, p. 228 (*Contra*).

[143] Liberty Warehouse Co. v. Burley Ass'n. 276 U. S. 71 (1928).

[144] Freund, E., *Standards of American Legislation*, p. 276.

CHAPTER XII

PUBLIC AND PUBLIC SERVICE CORPORATIONS

Review of Private Corporations

In seeking to find what private corporations really are we traced the corporate idea back to its origins in Italy and the northern lands. Though the concept may be embodied in many forms, they are included in a wider term, association. One of our great fundamental rights is the right of association, not expressed but implied in the rights of assembly and of liberty. Practically there is now the right of incorporation though not yet recognized as a constitutional guaranty implied in other rights. Yet any modern state that bars this method of doing business is a pariah among the states of the world. It must be confessed that the fictions and the prejudices of the past are not dead yet, but they are dying. Discrimination against corporations often takes the form of double or multiple taxation, but as other methods of holding property suffer, though in less degree, from this evil, the cases that illustrate the modern trend are not all corporation cases. As late as 1928 in Blodgett v. Silberman[1] Chief Justice Taft admitted that some state courts may still apply the ancient maxim of *mobilia sequuntur personam* to personal property generally, but it is firmly established in the federal jurisdiction that it applies only to intangible property " whether it approves itself to legal philosophic test or not." A merchant of New York, a member of a firm doing business under the laws of the state, the partners owning real estate and tangible personal property there, had his domicile at the time of his death in Connecticut. His executors paid the New York inheritance tax on the property which had permanent situs in that state, but his interest in the partnership was held to be under New York law intangible property, and as such was taxed again under the laws of Connecticut. Of course double taxation of this kind could not meet a "legal philosophic test," but it may be said in extenuation that the opinion of the chief justice was confined to the claim of the state of the owner's domicile, and that the claim of New York was not before the court. Nearly two years later another case of double taxation came before the court.[2] The estate of a deceased resident of New York "was administered and a tax exacted upon the testamentary transfer." Included in the intangible property of the decedent was $300,000 in the bonds of Minnesota and its cities. "Minnesota assessed an inheritance tax upon the same transfer." The state court, relying on Blodgett v. Silberman, just described, and an earlier case, Blackstone v. Miller,[3] which more clearly sustained "taxation both at the debtor's domicile and at the domicile of the creditor," reversed its own previous decisions and upheld the imposition of double taxation. But Mr. Justice McReynolds, speaking for the majority of the federal court which included the chief justice, declared: "In this court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the 14th Amendment." After asserting the justice of applying this rule to tangible personal property, he continued by saying: "And certainly, existing conditions no less imperatively demand protection of *choses in action* against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction." Blackstone v. Miller was "definitely overruled." Mr. Justice Holmes dissented, saying: "It seems to me that the law of Minnesota is a present force necessary to the existence of the obligation, and that therefore, however contrary it may be to enlightened policy, the tax is good." This growing distaste for double taxation has been brought to the protection of corporations. Washington imposed a filing fee and an annual franchise tax on foreign corporations, doing business in the state, based on the entire authorized capital stock, but the United States Supreme Court, again speaking through Mr. Justice McReynolds, citing other cases, decided this state legislation to be a burden on interstate commerce and taxation on property beyond the state's jurisdiction.[4] Mr. Justice Brandeis dissented, declaring the tax was not burdensome in fact; he subscribed to the doctrine that, "the substance and not the shadow determines the validity of the exercise of the taxing power." A later double taxation case came up from Virginia, which state attempted to tax a trust fund created in Maryland by a resident of Virginia.[5] A trust company had been given legal ownership, subject to a trust, created by the donor in the interest of his sons. The property was taxed in Maryland, and Virginia also imposed a tax on the same fund. Mr. Justice McReynolds spoke for the court to this effect: "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment." Mr. Justice Holmes alone dissented: "It seemed to me going pretty far to discover even that limitation to the 14th Amendment. It opens vistas to extend the restriction to stocks and bonds in a way that I cannot reconcile with Blodgett v. Silberman." [6] In spite of our abounding admiration of the great jurist it is hoped that his forecast is accurate and that in accord with "legal philosophic test" and "enlightened policy" and with reality and justice, the same doctrine will be applied to stocks and bonds. The Supreme Judicial Court of Massachusetts condemns a proposed law that would discriminate between unincorporated share companies on the one hand and associations without such transferable certificates on the other.[7] Yet the court still concedes that corporations may be discriminated against, as they are persons given special privileges by the state. We have seen that their privileges are the natural rights of the incorporators, that an unincorporated association under trust deed is almost indistinguishable from a corporation, and that a corporation is a person entitled to the equal protection of the laws. From private corporations we turn to the consideration of public corporations.

I. Public Corporations

1. *The Public Character of all Corporations*

We have seen that in the Roman empire all associations were public institutions, and if authorized to own property under private law and thus exercise corporate powers, their public character was still maintained. In England there was the right of association, recognized by the common law though not expressed in written law. But the doctrine grew up, possibly borrowed from the canon law, that only a sovereign power could make a corporation. Religion was a concern of state, the first interest. Closely connected with the church, and so matters of state interest, were education and charity. Therefore corporations organized for these purposes and for local self-government were public corporations. The same doctrine applied to the chartered guilds and the great trading companies. Their public character is illustrated by the power of visitation[8] to correct the irregularities of corporations. After the Reformation the supreme ordinary over the established church, exercising the right of visitation, was the king. He also was the visitor of all civil corporations, while the right of visiting eleemosynary foundations was committed to the donors and their heirs without surrender of the king's prerogative. Their public character is shown also by the rules under which corporations were dissolved.[9] Formerly at common law dissolution of a corporation extinguished contracts and debts, personal property vested in the crown or state, and real property reverted to the grantor, but now the obligations of contracts survive, debts are preserved, and real and personal property becomes assets for payment of creditors and distribution among shareholders.[10]

2. *The Classification of Corporations*

This change in the law upon dissolution of corporations having shareholders marks the change from a public to a private corporation. This change was hastened in the United States by the adoption of the doctrine of separation of church and state in certain of the colonies and states, finally in all. The decision in the Dartmouth College[11] case established the doctrine that educational and charitable charters might be beyond the power of the state to amend or repeal. Such corporations were private. When the principle of this decision was extended to business corporations they too lost their public character. The change must not be attributed solely to any one decision but to a silent process which finally established the principle, not recognized before, that corporations may be classified as public and private, and that private corporations may be subdivided into those created for profit and those not for profit.[12] Private corporations for profit may be likewise subdivided. While ordinary private corporations are engaged in undertakings in which the public has little direct interest, other private corporations are engaged in business in which the public is directly interested, and such private corporations may be called public service or quasi-public corporations.[13] Public corporations are usually formed solely for the purpose of carrying on the government, but in recent years they are created to enable the public itself to engage in a business affected with a public interest. Public corporations of the more usual type consist of part of the people of a given state, residing within a particular area, who are organized into a corporation for the purpose of carrying on the government in that area. If it is a city, it is given large corporate powers and called a municipal corporation. If the district is only a division of the state for the administration of the state government, and endowed to a limited extent with legal personality, it is called a quasi-municipal corporation or a quasi-corporation.[14]

3. *History of Public Corporations, Municipal, Quasi-Municipal, and Economic*

When a vill rose to importance its inhabitants in many cases were able to purchase from their lord by the payment of a money rent release from the former demands and services, and they received their houses and lands in burgage tenure. The vill became a borough. This grant from the local lord with all its incidental rights may have been by word of mouth and the free customs were held in the memory of the freemen, or it may have been by charter.[15] In Domesday Book William recognized over fifty boroughs already existing as such.[16] To many of these boroughs one or more charters were given in the following two hundred years. London alone received over twenty. Charters were given to other boroughs, not recognized as such in Domesday Book, yet asserted in their charters to have possessed their free customs under Edward the Confessor or even under Canute. Charters were granted by the king or mesne lords to newly created boroughs, frequently by granting them the same franchises as were possessed by a neighboring or older borough. The word borough was sometimes used for an area, and less frequently as a collective designation of the burgesses. In the charters the boroughs were often called communes but the set phrases for the creation of bodies corporate and politic came into general use at a later period.[17] Not till then was there the developed notion of an artificial person, distinct from the members. So it has been claimed that the earliest charter of the developed form was granted to Kingston-on-Hull in 1429.[18] As boroughs elected members to Parliament, it was the policy of despotic kings to limit the membership of such boroughs, making them close corporations, and to multiply charters so as to control Parliament. Feudalism had meant the surrender by the central government of all effective control over localities, so that on the continent sovereigns were in many instances reduced to impotent suzerains. Cities often became free states. But in England the king did not sink so far.

At a later time England shared in the general movement by which national states were built up by the destruction of feudal lordships and communal independence. Therefore in this transitional period English cities had little power but to care for their property, issue local police ordinances, and administer petty justice. The early American city charters were copies of the contemporaneous charters of the mother country. Some American cities, like Boston, clung to the town meeting as more democratic. Colonial cities were small and had limited powers.

The American Revolution enthroned democracy in the United States and later in England itself. Parliament, without divesting itself of sovereign power, leaves to the municipalities the initiation of their private or special bills, and reserves to itself careful consideration and decision. It has set up general administrative agencies over locally elected boards for advice, cooperation, and oversight. Our state legislatures, without executive leadership, have permitted individual members to initiate bills which determined the fate of municipalities in opposition to their will and their interests.[19] Remedy has been found in home rule which is but a return to feudal independence with all its dangers to the state.

In the mother country and in the colonies, counties were simply administrative districts, and were not regarded as corporations.[20] The sheriff was appointed and removed by the central government of the country or colony. In New England the town had very considerable importance and power, yet legally it was not a corporation. In the South the county was the local unit. In the Middle Colonies there was a combination of the two types. There towns or townships and counties, and later villages, came to be given limited corporate power, much less than was given to cities after the Revolution, and these counties and subdivisions of counties were called quasi-corporations or quasi-municipal corporations. It must be noted that now in some states these counties and subdivisions are called municipal corporations and the name is not restricted to cities.[21] In New

England now towns are given corporate powers, and in old England boroughs or cities, counties, and parishes are all corporations.[22]

There are other public corporations than cities and various areas of local self-government. The king of England is a corporation sole, but our states and the United States are not considered corporations, as they are sovereign and grant to lesser political bodies their charters. Our faulty doctrine is not approved by European states; they are corporations.[23] The University of Illinois is a public corporation, but the University of Chicago is private, the membership and control of the corporation determining. The Bank of Kentucky, when it was the people of the state so organized, and as a bank issued bills of credit, was a public corporation. Suppose a municipality [24] owns all the stock in a local public utility or owns a railroad almost the entire mileage of which is in other states than that of the owner, it is difficult to determine whether the corporation, so owned, is public or private. Where the public is owner of all the stock and the purpose of the corporation is affected with a public interest, it would seem that the corporation is public, unless it was organized as a private corporation and its original character still attaches to it. But suppose a corporation by the terms of its creative act is owned in the majority of its stock by the state and is controlled by the political organs thereof, is it public notwithstanding a minority of its stock is open to private subscription? The Philippine legislature created a National Bank; the government was the principal owner of the shares and the voting power on its shares was vested entirely in the governor-general. Later the law was changed, vesting the voting power in a board, composed of the governor-general and officers of the legislature. Four other corporations were created with similar provisions, the National Petroleum Company, the National Development Company, the National Cement Company, and the National Iron Company. The governor-general refused to act under the amended law on the ground that the Organic Act vested the executive power in him.

The case coming up to the United States Supreme Court Mr. Justice Sutherland in his majority opinion noted that Congress in creating corporations for governmental purposes, such as the Smithsonian Institution, had sometimes provided for a governing board composed in part of members of the Senate and House of Representatives, but in cases of governmentally organized and controlled stock corporations Congress had uniformly recognized the executive authority in their management. Therefore it was decided that the Philippine legislature could not confer upon its own members the power to vote the stock of the government's corporations for the election of directors. The Organic Act vested the executive power in the governor-general, and this included the authority to vote the stock of government-owned corporations.[25] Mr. Justice Holmes dissented, holding that the corporations concerned were private, and that, whoever owned the stock, the corporations did not perform the functions of the government. He contended that public ownership did not make the voting of the stock an executive function. Quite apart from the legal question, as a matter of business efficiency, if the government is itself to engage in business affected with a public interest, and if it employs the corporate organization as most suitable, the active supervision should be in the executive department and not in the legislative, except through the determination of policy. Says W. F. Willoughby of federal corporations:[26] "The creation by the Government of corporations as agencies for the performance of certain specific activities constitutes what is probably the most interesting feature, from the purely administrative standpoint, of the action taken by the Government for the performance of its war work. Not less than six such corporations were created — the War Finance Corporation, the Emergency Fleet Corporation, the Grain Corporation, the Sugar Equalization Board, the Russian Bureau Incorporated, and the Housing Corporation." He enumerates the distinct advantages in conducting business according to the most approved methods of private corporations, each such agency having financial autonomy and each being kept outside the field of partisan political pressure. For governmental services which have their own property, revenue, and expenditures he thinks this device " may easily prove to be a form of organization that will be largely employed in the future." Recent legislation of this character shows that informed opinion approves the policy of meeting great economic needs by methods that have been tested in great business undertakings.

4. *The Fundamental Rights of Public Corporations*

Originally municipal charters in England were granted by king or mesne lord to his petitioning tenants. As to the necessity of consent corporations then resembled private corporations now. Consent of the inhabitants is not necessary now. A state legislature has full power except to pass acts prohibited by federal or state constitution. It is the function of the legislature to create public corporations and other agencies to enforce the general law and preserve peace. The legislature is the judge of the necessity, and a town or village which objects to the increased expense of city government has no redress,[27] unless the constitution, as is the case in Massachusetts and a number of other states, provides that no town shall be incorporated without the consent of the inhabitants. Yet if an urban community spreads into adjoining towns, the legislature may order the annexation of such built-up areas, for the constitutional provision, just noted, would not forbid forced annexations.[28]

While the charters of private corporations are held to be contracts[29] binding the state legislature, with such exceptions as will be noted in a later chapter, the charters of public corporations are not so protected.[30] The legislature may amend the charter or withdraw it altogether; it may divide the territory to which the charter applied, and assign all the debt of the former corporation to either of its successors.[31] Yet if the successor, saddled with the debt, fails to pay, the courts may hold the whole former territory liable.[32]

Is there a right then of local self-government? Chief

Justice Cooley[33] of Michigan held to the doctrine of implied constitutional right of local self-government. The cities of Pennsylvania have suffered in the past from ripper legislation, yet says Professor Cook of the University of Chicago Law School: "It would seem better on the whole to rely on the good sense and fairness of the legislature, rather than to attempt to stretch constitutional provisions to cover cases not within the contemplation of their framers."[34]

Formerly there was an outcry against special legislation, and constitutional amendments were adopted to compel the legislatures to treat all public corporations alike which were similarly situated. Now the cry is for home rule charters so that special legislation may come back in all conceivable home-brew variety, but here it is necessary for the courts to draw the line between state and municipal affairs, for it would be dangerous to give the cities a vested right in the administration of state law. Much better is the proposal presented to the convention of municipalities of Nova Scotia that there be established in the provincial government a bureau of municipalities, charged to superintend them as well as advise and inform them. Subject to such supervision the municipalities might be given greatly expanded powers.

II. Public Service Corporations

1. *Public Service or Quasi-public Corporations*

To this point the present chapter has dealt with public corporations, bodies corporate and politic created to carry on the government, or corporations organized on the model of private corporations, publicly owned, and created to carry on business affected with a public interest. From them we turn to private corporations which are agents of the government, corporations the business of which involves the exercise of special governmental powers, or is affected with a public interest. An acceptable name, though not broad enough, is public service corporations. They are frequently called quasi-public corporations, but that name does not suggest their real nature, that of private corporations. They are private corporations the business of which is affected with a public interest.[35]

2. *Public Control of Business Affected with a Public Interest*

The doctrine of property affected with a public interest was enunciated by the famous English judge, Lord Hale, who said: "If the . . . subject have a public wharf unto which all persons that come to that port must come as for the purpose to unlade or lade their goods . . . there cannot be taken arbitrary or excessive duties or cranage, wharfage . . . but the duties must be reasonable and moderate. . . . For now the wharf and crane, and other conveniences are affected with a public interest." [36] This doctrine was definitely adopted and formulated in this country in the celebrated case of Munn v. Illinois. The court held that "when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." [37]

3. *Common Law and Statutory Determination of Public Calling*

Public service corporations do not come under the doctrine of business affected with a public interest because they are corporations, for the doctrine applies to private natural persons as well when their business is of the same character. Society has an interest in every kind of business, but it has a direct, public interest in certain kinds of business. The common law of old time recognized the surgeon, the smith, the innkeeper, the tailor, the common carrier, the ferryman, and the miller as pursuing public callings. Their business was affected with a public interest. But changed conditions have worked a silent transfer of the occupations of the tailor, smith, and surgeon to the standing of private callings, as the courts now interpret the common law. Modern statutes have added to the list of public callings, or businesses affected with a public interest, the business of railroads, turnpikes, and canals, of the telegraph and telephone, of storage of grain and tobacco, the business of stockyards, of cotton gins,[38] of the supply of water, gas, light, heat, and power, also of banking, insurance, and even the gathering and distribution of news and market quotations. Yet it is not enough for the legislature to bring a business into the class of public callings.[39] Though the presumption is that the statute is constitutional, the court may fail to agree with the legislative determination that the calling is public.[40]

4. *Judicial Determination of Business Affected with a Public Interest*

In answering the question whether the law is constitutional or not, whether the business is affected with a public interest or not, the court sometimes reaches its decision by deference to precedents. What the early courts said, they say. Again they reach their conclusion by resort to analogy. What applied to a train of pack animals, will apply now to a railroad or express company. Since the grant of legal monopoly implied the reciprocal obligation of reasonable service to the public, the courts now sometimes extend the same obligation to virtual monopoly. Where the nature of the business requires the bestowal of special legal privilege, as to an electric light company, the courts deny to the company the power to arbitrarily fix the prices at which it will furnish the service. It was formerly the doctrine that when the charter makes performance of certain public duties mandatory the court will require performance even if obedience renders the business unprofitable. That may still theoretically be the doctrine when the contract is made for a brief period, but even then the courts will find a way to invalidate the contract if they find its terms oppressive.[41] There is no definite test of what business is affected with a public interest. Yet there is this common characteristic in public callings that they all perform services as distinguished from selling goods.[42]

5. *The Duties of Public Service Corporations*

It is their duty to give equal service to all. "A railroad company cannot . . . discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs."[43] This doctrine, however, does not apply to the owner of a theatre because his business is not a public calling.[44] Yet Mr. Justice Holmes, dissenting in Tyson v. Banton,[45] said what most enlightened people approve: "It seems to me that theatres are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France." The legislature had attempted to prohibit an imposition upon the public in the form of resale of tickets by brokers at excessive prices. Concerning this law the jurist said: "If the people of the state of New York, speaking by their authorized voice, say that they want it, I see nothing in the constitution of the United States to prevent their having their will."

Furthermore it is the duty of public service corporations to continue to give service, even if they are unable to come to amicable terms with the city. The East Ohio Gas Company had been given a monopoly of the gas business in Cleveland. Through its mains it supplied two hundred thousand users in the city. Its contract had expired, and it claimed the contract right to discontinue to supply unless its proposed rates were accepted. But a state law had been passed before the contract with the city was made which prohibited abandonment without the approval of the public utilities commission. The Court of Appeals found that the monopoly privilege put the very necessities of life in the control of the company, and therefore held that under the law the corporation could not discontinue its service.[46] In a case involving similar threats the United States Supreme Court held: "A public utility may not use its privileged position, in conjunction with the demand which it has created, as a weapon to control rates by threatening to discontinue that part of its service, if it does not receive the rate demanded." [47]

It is the duty of a public service corporation not to discriminate in rates. Half a century ago the courts said that while a company could charge a reasonable compensation and no more, there was no wrong if it saw fit to charge less than this reasonable rate to some of its patrons. Later this doctrine was modified to the extent that proof of discrimination in rates was evidence that the rates were unreasonable. Later in the case of Messenger v. Pennsylvania Railroad Co.[48] the doctrine was developed that discrimination in rates is itself illegal.[49]

6. *The Rights of Public Service Corporations*

They have duties and rights. While there is almost, if not quite, the extinguishment of rights in public corporations, as against the state, except when constitutions are amended in their behalf, private corporations have constitutional rights which are, or ought to be, almost identical with those guaranteed to private citizens, and public service corporations have rights assimilated to those of private persons engaged in the same business. The nature of some kinds of business, insurance for example, justifies their limitation to corporations.[50] Public service corporations do not always receive equitable treatment when in competition with public corporations engaged in the same business. It would not be fair to tax ferry companies to build a free bridge which would take from them a large part of their patronage. But if the bridge is financed on the basis of tolls, the ferry companies are relieved from a burden and permitted to prepare for the day when the bridge becomes free. When public service corporations pay state and federal taxes, not required of public corporations engaged in the same business, there is not a just basis of comparison of their relative cost to the consumer and the public. It would seem that an identical method of keeping accounts should be required of both, and that the same taxes should be exacted from both, just as South Carolina [51] was compelled to pay federal tax on its liquor business. The public service corporations have a grievance here, but they have an advantage in their facility in merging with others, to the profit of the whole industry.[52] They have also the right to make contracts [53] with other persons and to make regulations [54] for the conduct of their business.

Their outstanding right is to reasonable compensation.[55] The United States Supreme Court in Reagan v. Farmers' Loan [56] held that the equal protection clause of the 14th Amendment forbids legislation by which the property of one person is wrested from him for the benefit of another or of the public. Therefore the lower court was competent to inquire if the rates prescribed by the state railroad commission were reasonable. In Smyth v. Ames [57] it was said: "The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the service rendered by it." But how shall the fair value of the property of a public service corporation be computed for the purpose of rate fixing? [58] There are various theories, as of original cost of property, reproduction cost, or prudent investment cost. In computing the fair value of the property as a rate basis it would seem proper to exclude the free gifts of the public in the charter and franchise.[59] The same may be said of any public contribution or loan of money or property, unless the company were paying the same interest to the city which is proposed the company should receive from its patrons as a proper revenue from its property.[60] Otherwise the public would duplicate its gifts to the same private treasury. If the sole basis is original cost the rates may be so low that the company will be unable to make replacements, borrow money, or pay dividends. If the sole basis is reproduction cost, the variation will be so great from year to year that experts say the whole system of valuation by commissions will break down.[61] On a falling market investors will get no income or an inadequate one from their investments. On a rising market there would be promise of such extraordinary returns that wild speculation[62] would be induced, as, it is claimed, was the result of the O'Fallon[63] decision by the United States Supreme Court. The Interstate Commerce Commission gave consideration to all elements of fair value, but their theory was that of prudent investment. It was a workable plan,[64] evolved out of their intimate experience with rate making, and would fully protect past, present, and future investors, and give stability to the railroad industry. But the court had for some years been tending in another direction. It was Mr. Justice McReynolds that spoke for the majority, on the theory of reproduction cost, the jurist who has given valiant aid to corporations, and it was Justices Brandeis, Holmes, and Stone who dissented. Now Massachusetts[65] is trying to work out a contract system that will keep valuation cases out of court, and if that fails the people will reluctantly turn to public ownership, for the United States Supreme Court clings to the position which it has taken.[66]

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[1] 277 U. S. 1 (1928).

[2] Farmers' Loan Co. v. Minnesota, 280 U. S. 204 (Jan. 6, 1930).

[3] 188 U. S. 189 (1903).

[4] Cudahy Packing Co. v. Hinkle, 278 U. S. 460 (1929); Roughly one half of one per cent of the business of the company was in Washington. On the unequal taxation of foreign corporations, see Quaker City Cab v. Pa., 277 U. S. 376 (May 28, 1928).

[5] Safe Deposit and Trust Co. v. Va., 280 U. S. 83 (1929).

[6] See 1.

[7] Re Opinion of the Justices, 165 N. E. 904 (1929). On the corporate character of these Massachusetts associations under trust deed, see Hemphill v. Orloff, 277 U. S. 537 (June 4, 1928).

[8] Cooley's *Blackstone*, Book I, pp. 480, 481.

[9] *Ibid.*, Book I, pp. 484, 485.

[10] Wilgus, H. L., "Private Corporations," pp. 175, 176, *American Law and Procedure*, Vol. VIII.

[11] The Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

[12] Wood, W. A., *Modern Business Corporation*, p. 2.

[13] Cook, W. W., "Municipal Corporations," pp. 3, 4, *American Law and Procedure*, Vol. IX. Cathecart, A. M., "Public Service Corporations and Carriers," p. 278, *American Law and Procedure*, Vol. VIII.

[14] Cook, W. W., *op. cit.*, pp. 5, 6. Dillon, J. F., *Municipal Corporations*, pp. 17, 27 ff.

[15] Ballard, A., *British Borough Charters*, pp. xl ff.

[16] *Ibid.*, p. xxvi.

[17] *Ibid.*, p. CI. Carr, C. T., "Early Forms of Corporateness," p. 162, *Select Essays in Anglo-American Legal History*, Vol. III.

[18] Cook, W. W., *op. cit.* p. 7. Dillon, J. F., *op. cit.*, p. 12. Smith, T., English Gilds.

[19] Macdonald, A. F., *American City Government and Administration*, pp. 48 ff.

[20] Cook, W. W., *op. cit.*, p. 11. Dillon, J. F., *op. cit.*, p. 17.

[21] *Ibid.*, pp. 17–26. Porter, K. P. *County and Township Government*, pp. 1–20. Cook, W. W., *op. cit.*, pp. 11–13.

[22] Stephen's *Commentaries*, Vol. III, pp. 33 ff.

[23] Gareis, K., *Introduction to the Science of Law*, p. 104.

[24] Cincinnati, and its railroad to Chattanooga, leased to the Southern.

[25] Springer v. Philippine Islands, 277 U. S. 189 (1928).

[26] Willoughby, W. F., *Government Organization in War Time and After*, p. 355. On the doctrine that the Fleet Corporation is a sub-department of the government, distinguished from instrumentalities like federal reserve banks, see United States Fleet Corp. v. Western Union Telegraph Co., 275 U. S. 415 (Jan. 3, 1928). U. S. Fleet Cor. v. Rosenberg, 276 U. S. 202 (Feb. 20, 1928). On the doctrine that the Fleet Corp. and other like instrumentalities are government-owned private corporations, see United States v. McCarl, 275 U. S. 1 (Oct. 10, 1927).

[27] Berlin v. Gorham, 34 N. H. 266.

[28] Cook, W. W., *op. cit.*, pp. 14–17. Dillon, J. F., op. cit., pp. 44–69.

[29] See 11.

[30] Dillon, J. F., *op. cit.*, p. 71.

[31] Johnson v. San Diego, 109 Calif. 468. Laramie County v. Albany County, 92 U. S. 307 (1875).

[32] Brewis v. Duluth, 3 McCreary 219, U. S. Cir. Ct.; 9 Fed. 747 (1881).

[33] Cooley, T. M., *Constitutional Limitations*, pp. 45, 209. Dillon, J. F., *op. cit.*, pp. 81 ff.

[34] Cook, W. W., *op. cit.*, p. 32.

[35] Cathcart, A. M., *op. cit.*, pp. 277–280. Hall, J. P., *Constitutional Law*, p. 161. Freund, E., *Police Power*, p. 380.

[36] *Ibid.*, p. 380.

[37] Munn v. Illinois, 94 U. S., 113 (1877).

[38] Frost v. Corporation Commission, 278 U. S. 515 (1929).

[39] Williams v. Standard Oil Co., 278 U. S. 235 (1929).

[40] Cathcart, A. M., *op. cit.*, pp. 282 ff. Freund, E., *op. cit.*, pp. 381 ff. Cooley, T. M., *op. cit.*, pp. 734 ff.

[41] Railroad Commission v. Los Angeles R. Corp., 280 U. S. 145 (1929).

[42] Cathcart, A. M., *op. cit.*, pp. 284 ff. Freund, E., *op. cit.*, pp. 385 ff.

[43] Chicago and N. W. v. Williams, 55 Ill. 185.

[44] Yet N. Y. and Ill. require full and equal enjoyment of theatres. Law sustained in People v. King, 110 N. Y. 418 (1888).

[45] 273 U. S. 418 (1927).

[46] *National Municipal Review*, Vol. 18, p. 714, Nov. 1929.

[47] United Fuel Gas Co. v. Public Service Commission, 278 U. S. 322 (1929).

[48] 37 N. J. L. 531.

[49] Cathcart, A. M., *op. cit.*, pp. 322 ff. Freund, E., *op. cit.*, pp. 384 ff.

[50] *Ibid.*, p. 368. Commonwealth v. Vrooman, 164 Pa. 306.

[51] South Carolina v. United States, 199 U. S. 437 (1905). Willoughby, W. W., *On the Constitution*, Vol. I, pp. 114 ff.

[52] *National Municipal Review*, Vol. XVIII, p. 587, Sept., 1929.

[53] Cathcart, A. M., *op. cit.*, pp. 361 ff.

[54] *Ibid.*, p. 345.

[55] Mead, E. S., *Corporation Finance*, p. 216.

[56] 154 U. S. 362 (1894).

[57] 169 U. S. 466 (1898).

[58] Deming, A. S., *The Financial Policy of Corporations*, p. 73; That promoters on the average pay for a going concern ten times the net earnings.

[59] See dissenting opinion of Justice Brandeis in United Railways and Electric Co. v. West, 280 U. S. 234 (Jan. 6, 1930).

[60] Gilchrist v. Interborough, 279 U. S. 159 (Apr. 8, 1929). *National Municipal Review*, Vol. XVIII, pp. 333 ff., May, 1929.

[61] Bauer, John, "The O'Fallon Case — The Decision and what it Portends," *National Municipal Review*, Vol. XVIII, pp. 458 ff., July, 1929.

[62] Bauer, J., "What Price Public Utility Speculation?" *National Municipal Review*, Vol. XIX, p. 56, Jan., 1930.

[63] St. Louis and O'Fallon R. Co. v. United States, 279 U. S. 461 (1929).

[64] Mead, E. S. *op. cit.*, p. 237.

[65] *National Municipal Review*, Vol. XVIII, p. 189, March, 1929.

[66] United Railways and Electric Co. v. West, 280 U. S. 234 (Jan. 6, 1930).

CHAPTER XIII

NON-CITIZEN NATIONALS

The Epoch-changing Year, 1898

From the study of full citizens and partial citizens we pass to the study of persons who are not citizens at all, though they owe permanent allegiance to the United States. This class of persons numbers over ten million. Indeed, they cannot become citizens under existing law as interpreted by the highest court, even if they take up residence in the territories of Hawaii and Alaska, or in the states.[1] Among them are now several million persons who were born in the territory and under the jurisdiction of our common sovereign. By the law of the soil they are subjects of that sovereign. By the law of blood, which may still be the local law, they are no less its subjects. The term citizen was interpreted in the case of Minor v. Happersett [2] to be equivalent to the word subject, and employed in this country as more appropriate to republican institutions. Both terms signify merely membership in the nation. The Malays of the Philippine Islands and Guam and the Polynesians of Tutuila are certainly members of the nation; they are nationals of the United States.[3] According to former usage they would be citizens, but by present law they are not. Was the treaty, which brought a revolution in our policy concerning the acquisition of territory and concerning the naturalization of the civilized inhabitants of such territory, constitutional? We are dealing with a crisis in our history, a change in policy of vast significance. Were the laws subsequently passed in development of this new policy, constitutional? The people of this country were startled by the world mission which the Spanish-American war thrust upon them. The United States Supreme Court, always a conservative body, was divided almost evenly, four justices against the new policy of imperialism, four in favor of it, and one taking an intermediate view of the constitutional questions before the court. The present chapter deals with the status of these non-citizen nationals, and with the constitutionality of the treaty and laws which related to them.

The questions which so puzzled jurists forty years ago are not even now of easy comprehension, but if we divide into stages the passage of foreign territory and inhabitants from the beginning of military occupation by a conquering power to the final and complete incorporation of both territory and inhabitants with that power on the basis of equality with its original territory and people, each stage may become relatively clear, and the whole process an orderly progress, based on reason and justice. It is therefore proposed to treat of five stages from conquest to complete incorporation. They are, (1) Military occupation of foreign territory, (2) Presidential government of acquired territory, (3) Congressional government of unincorporated dependency, (4) Advanced stage: naturalization of inhabitants without incorporation of dependency, and (5) Complete incorporation of dependency and its inhabitants.

I. Military Occupation of Foreign Territory

The decisions in the group of cases known as the Insular Cases were all delivered on one day by the United States Supreme Court when Porto Rico had already passed to the third of the stages, as defined above. The most important of these cases were those of De Lima v. Bidwell, Downes v. Bidwell, and Dooley v. United States.[4] Later Dooley again sued the United States, and so his cases are designated as first Dooley case and second. The first stage is covered by the first part of the first Dooley case, the second stage, by De Lima v. Bidwell and by the second part of the first Dooley case, and the third stage, by Downes v. Bidwell. There was no serious controversy over the first stage, and no division of opinion among the members of the court. In the second and third stages there was a most notable contest, with F. R. Coudert as counsel for the anti-imperialists and Attorney-General Knox supporting the national administration. The four imperialist judges under the lead of Mr. Justice White, later elevated to the chief-justiceship, substantially agreed with the position of the government, though with the employment of a new terminology, much criticized by Chief Justice Fuller, but now generally employed. The white-haired chief justice and his antediluvian band, four in all, consistently gave their vote against the administration. Mr. Justice Brown was a stickler for precedent and yet his feet were planted on reality. In deciding cases covering the second stage, he rejected the arguments of the government, and thus gave the majority to the conservatives. Yet far more important was the third stage and here he joined the four imperialists. He wrote all the so-called opinions of the court, others writing concurring or dissenting opinions. Yet his opinions, like that of Chief Justice Taney in the Dred Scott case, were really his personal opinions announcing the judgment of the court. Though only the opinions of one man they were all of a piece, and it was Brown that wrote many later decisions in this field so long as the division persisted in the court.

At the end of the Spanish-American war when Spain was already crushed General Miles paraded as a deliverer through Porto Rico. American public opinion acclaimed this conquest as a permanent acquisition. After the close of hostilities but before the treaty of peace had been ratified Dooley was shipping goods from New York to San Juan. The only government in Porto Rico was the American. Was it not collecting taxes on exports from one of the states, a thing prohibited by the constitution?[5] Or if Porto Rico was part of the United States the government was taxing goods shipped from one port to another of the same country. Either argument was but a gesture, for the precedents were on the side of the government. Chief Justice Taney in the important decision of Fleming v. Page[6] had held that the occupation of the Mexican port of Tampico in the Mexican war did not make Tampico a part of the United

States. It still remained foreign in the meaning of the tariff laws. When Cuba was occupied in this same war with Spain by American troops for an extended period a similar decision was made in Neely v. Henkel.[7] So now in Dooley v. United States Mr. Justice Brown, speaking for the entire nine members of the court, held that Porto Rico from the beginning of the military occupation till the exchange of ratifications was a foreign country with reference to the United States. Porto Rico being foreign, its government could collect duties on goods from New York, even though that government was a military government existing under the authority of the president as commander-in-chief. It may be added that the people owed temporary allegiance to the United States and permanent allegiance to Spain.

II. Presidential Government of Acquired Territory

1. *The Questions Before the Court*

When by ratification of the treaty of cession Porto Rico had passed to the sovereignty of the United States, but Congress had not yet enacted a law for the government of the island and had not imposed taxes for its support, was the president authorized to collect duties on goods introduced into the states from Porto Rico? This question was answered by the decision in De Lima v. Bidwell.[8] Was the president at this same time authorized to collect duties on goods introduced into Porto Rico from the states? This was answered by the decision in the second part of the first case of Dooley v. United States.[9]

2. *The Argument of the Government*

The argument of the government was this. There was no intention of the treaty-making power to give United States citizenship to the people of Porto Rico, or to extend the constitution to the island, or make it a part of the United States, or take it within the American customs union. Congress acquiesced in this policy by its prompt appropriation of the money payment promised in the treaty and by the passage of the Foraker Act a year later. It was therefore the intention of the President, Senate, and House of Representatives that Porto Rico should be outside the customs union until by the provisions of the Foraker Act the island should ultimately come into the customs union. It was the understanding of these political branches of the government that until the Foraker Act went into operation the Dingley Act was still in force, and that under it duties should be collected on imports from Porto Rico as still in the sense of the tariff laws a foreign country. At the same time in accordance with established custom it was the duty of the president to continue in the administration of the laws of Porto Rico, including tax laws, except so far as he modified these laws as commander-in-chief, until Congress set up a government there, that is, till the Foraker Act went into operation.

3. *The Position of the Anti-Imperialists*

The picturesque chief justice held that when Porto Rico passed by treaty from Spain to the sovereignty of the United States, it was domestic territory and therefore a part of the United States and part of the American customs union. Its people were entitled to every right which citizens of the United States in any other territory may legally claim. He believed that the treaty of cession incorporated Porto Rico into the United States in spite of its provisions against incorporation, though he did not employ this terminology. Therefore the duties collected were illegal, not only because the laws did not authorize their collection, but because Congress had no power to pass laws imposing duties on goods from a part of the United States.

4. *The Deciding Opinion of Mr. Justice Brown*

Mr. Justice Brown occupied a mediating position between the innovators and the conservatives. He desired to follow the precedents and yet as far as possible uphold the laws of Congress, for the presumption is always in favor of the constitutionality of an act of Congress. The De Lima case did not involve the constitutionality of an act of Congress. Now in Fleming v. Page [10] Chief Justice Taney said that a ceded territory must be regarded as foreign until its ports were established as domestic ports by act of Congress. But this part of the decision was overruled by the later case of Cross v. Harrison.[11] The American military governor of California put the American tariff laws into force as soon as he was notified of the treaty of cession and before Congress had passed any laws for the creation of collecting districts. The action of the military governor was approved by President Polk and sustained by the Supreme Court. On the authority of that decision Mr. Justice Brown held that Porto Rico after the ratification was not foreign territory and that the Dingley Act did not authorize the collection of duties on goods not imports.

Having decided the case of De Lima v. Bidwell in favor of the plaintiff and against the collector of the port of New York, he similarly decided the case of Dooley v. United States.[12] After the ratification of the treaty Porto Rico remained under the authority of President McKinley as commander-in-chief. It was essentially military government, whatever its form. Now military government is always more or less arbitrary. Unusual, even despotic, powers are conceded to military government. Yet the justice was able to quote precedents to show that there were limitations even on a military government. It could not go beyond what was necessary in the situation. The court having held that no law authorized the collection of duties on goods shipped from San Juan to New York, it did not seem just or appropriate that duties should be collected on goods from New York to San Juan. Therefore the court held that after ratification and before the passage of the Foraker Act it was unnecessary and so illegal to collect duties on goods introduced into Porto Rico from the states. The president, even as commander-in-chief, had not this authority.

5. *Sequels of the De Lima and First Dooley Cases*

We must first examine the case of Gonzales v. Williams.[13] The immigration law of 1891 provided that alien immigrants could under certain circumstances be refused admission to the country and deported to the country of origin. A Porto Rican woman by the name of Gonzales came to New York in 1902 and was detained as an alien immigrant with the purpose of deporting her if she proved likely to become a public charge. The case turned on the question, Was she an alien immigrant? Porto Rico was not a foreign country. Gonzales owed allegiance to the United States. Therefore she could not be an alien, and the law, as it stood, could not be enforced against her.

There was also the interesting Philippine case of the Diamond Rings.[14] The Philippine Islands were also in the second stage, that of presidential government of acquired territory. The lately deceased and greatly honored chief justice of the United States Supreme Court was governor under the president. Governor Taft proposed tariff schedules for the islands, but was overruled by the Secretary of War, who favored American exporters. In that very year, 1901, the principle of the De Lima and first Dooley cases was applied to the Philippines. They were declared to be no longer foreign territory and the Dingley rates no longer applied to goods brought from the islands to the states.

At the present time only Guam and American Samoa (Tutuila) appear to be in this second stage of development. The successive tariff laws, however, provide that their rates do not apply to goods imported from foreign countries into these possessions. Therefore so far as tariff laws are concerned the doctrine of the two leading cases for this stage does not fully apply, since Congress has expressed its will on the subject,[15] except that their native products enter the states free of duty. The inhabitants of these islands are not aliens, but they are not citizens of the United States. The president rules through the Secretary of the Navy and local governors, naval officers. He is thus able to enforce local customary laws, making such changes as conditions warrant, and impose taxes, without the fine-spun limitations of an intricate system utterly meaningless to such territory and people. Guam came to the United States by the Spanish treaty of cession. "The natives, though yet ineligible for United States citizenship, are proud of being very loyal subjects of the United States. They give constant practical evidence of the real gratitude they feel for the material and sociologic benefits that have come to them through the ministrations of the United States Naval Government of Guam." [16] American Samoa came to the United States by the partition of the distracted islands among the three protecting powers, with the ratification of the people. Under the unhampered power of the president, a considerable degree of self-government is attained. In an annual general meeting of delegates decisions of a political, economic, and educational nature are made.[17] Under American wardship this gifted people is making progress, amply justifying its assignment to this second stage of progressive incorporation in the nation.

III. Congressional Government of Unincorporated Dependency

1. *The Provisions of the Foraker Act*

The act provided that the inhabitants of Porto Rico should be considered citizens thereof and, as such, entitled to the protection of the United States. It was plain that there was no intention of immediately incorporating Porto Rico within the United States or extending the full privileges of citizenship to the inhabitants. Duties for a period of a little less than two years were to be collected on merchandise coming into the United States from Porto Rico and going into Porto Rico from the United States. This special tariff was to be fifteen per cent of the Dingley rates. The amount collected from this taxation at both ends was to be paid into the Porto Rican treasury. The government's attorneys were able to show that the Porto Ricans were accustomed to import taxes but quite unfamiliar with property taxes. Therefore the two years gave opportunity to inaugurate a new system of taxation in the island. Was this law constitutional? The answer was given in the case of Downes v. Bidwell.[18]

2. *The Argument of the Government*

As to the argument of expediency the attorneys were able to draw a picture of the Foraker Act as a generous measure framed to meet the special needs of the island. If the legislative assembly of Porto Rico should perfect its system of local taxation before the expiration of the two years the president was authorized to proclaim free trade between the United States and the island. It was shown that the people were not ready for the organization of courts and juries after our system, and that if all the limitations of the constitution were applied to Porto Rico and the other new possessions crime could not be punished. To extend the constitution to the new possessions at once would leave the national government helpless by demanding impossibilities.

As to the constitutional argument Mr. Knox and his associates were able to find but three meanings of the words United States. (1) First, there is the meaning of United States as used in the constitution. Sometimes the corporate idea is foremost, but more frequently the idea is geographical, the states united, the union of states. Nowhere in the constitution are territories conceived of as part of the union of states, as part of the United States. The territories are treated as property over which the federal government has full power. (2) Secondly, there is the meaning of United States when Congress passes a law extending the constitution to a territory, making it in the legislative sense a part of the United States. (3) Thirdly, there is the meaning of United States in the international sense. Every possession of the United States is part of the United States as the term is used in international law. Porto Rico is part of the United States in the international sense, but it is certainly not a part of the United States in the constitutional sense, because it is a territory, and it is not a part of the United States in the legislative sense, either by action of the treaty-making power or of Congress. Therefore Congress can make all needful rules and regulations for this territory, this property, this possession of the United States.

3. *The Philosophy of Mr. Justice White*

Mr. Justice White was the leader of the group of imperialists in the court who favored the ends sought by the government, but supported them not so much by arguments drawn from legislative and judicial precedents as by an original philosophy. Mr. Justice Gray, of this group, was not able to follow his leader all the way, so White spoke for himself and two others, but as his views have been accepted by the court as later constituted they have great authority. Chief Justice Fuller accused him of injecting an occult meaning into the word incorporation. According to White the words United States meant in the constitution the several states and the territory extending to the Mississippi. Whenever Congress by some action, express or implied, incorporates newly acquired territory with the United States, such territory becomes part of the United States in the constitutional sense. The treaty-making power acquires new territory as a possession of the United States, but only Congress can make such territory a part of the United States. Now Porto Rico had been acquired by the treaty-making power without promise of incorporation, and Congress had passed no act incorporating the territory with the United States. The great word with White was incorporation. It seemed to fill a long-felt want. It is convenient to look upon territories either as incorporated and so brought into the body of the United States as organized territories or states, or as unincorporated and so mere possessions, dependencies of the United States.

4. *The Conservatism of Chief Justice Fuller*

The general attitude of the chief justice was presented in the discussion of the cases which cover the second stage. The long-established habit of the federal government of acquiring adjacent territory, relatively vacant, making its civilized inhabitants citizens, extending the constitution to the territory, and treating it as part of the United States, was held by Fuller to be not the result of wise legislative discretion, but of constitutional necessity. When territory is acquired the inhabitants automatically become citizens. The right of jury trial is theirs, no matter what the results may be. Wherein a treaty makes other provisions it is void like an unconstitutional law. He denied "that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."

5. *The Deciding Opinion of Mr. Justice Brown*

It was the vote of Brown that gave the decision to the government. He was assigned to write the opinion of the court, but it was in many of its points his own personal opinion. When in the De Lima case he held that Porto Rico was not a foreign country and therefore the Dingley tariff law did not apply to it, he did not say that Porto Rico was part of the United States in the constitutional sense or that Congress was without power to pass tariff laws applying to the trade between the United States and Porto Rico. In fact he agreed exactly with the government's argument in this case of Downes v. Bidwell, outlined above. He showed from the terms of the constitution, the history of the times, and early statutes that the United States included only the states in the constitutional sense. The only reference to territories in the constitution treats them as property over which Congress has both federal and state powers, that is, full sovereignty. He shows that certain treaties had promised eventually the full incorporation of newly acquired territory as states in the union, and that Congress had passed acts extending the constitution to territories. While Congress had been consistent in its laws, the courts had not been harmonious, yet stripping dicta from the opinions, the decisions of the courts in former cases were in harmony with the interpretation put upon the constitution by Congress and with his own interpretation of the constitution. The territories, accordingly, were not originally included in the United States but were property of the United States lying outside of the union. But further he shows that it had been held in former decisions that when Congress has once formally extended the constitution to territories, it cannot undo the action. But Porto Rico was not a state of the union; it was not a territory to which treaty or statute had extended the constitution. It was not within the customs union, and had no constitutional guaranty of jury trial. Yet it was the constitution that gave to Congress the power to make needful rules and regulations for Porto Rico. There were constitutional limitations upon the power of Congress in legislating for Porto Rico. There are fundamental rights which Congress must respect everywhere. Judged by these wide powers and these limitations the Foraker Act was valid.

6. *Sequels of Downes v. Bidwell*

The second case of Dooley v. United States[19] must be briefly examined. Dooley was still shipping goods from New York to San Juan, and now he claimed that the duties imposed by the Foraker act were unconstitutional on the ground that the United States was collecting duties on goods exported from one of the states. The Foraker act was unconstitutional, he claimed, notwithstanding the fact that the Downes decision had declared it valid. But the court decided in this second Dooley case, Brown again writing the opinion, that the goods sent from New York to San Juan were not exports, because exports are goods going to a foreign country, and therefore the prohibition against taxing exports from any state did not apply. The Foraker Act was again declared valid.

The case of Hawaii v. Mankichi [20] may be regarded as a sequel of the Downes case. It related to jury trial in the Hawaiian Islands after the adoption of the Newlands Resolution. The joint resolution of 1898 did not make the citizens of the island republic citizens of the United States or extend "the United States customs laws and regulations to the Hawaiian Islands." [21] The organic act of 1900 made the citizens of Hawaii citizens of the United States, extended the constitution to the territory, thereby created, with "the same force and effect . . . as elsewhere in the United States." [22] Laws too were extended not locally inapplicable, and the Hawaiian customs laws and jury laws with many others were repealed. So this brief period of two years may be assigned to the third stage, that of congressional government of unincorporated dependency. During this interval the laws of Hawaii in general were still enforced. Mankichi was indicted without a grand jury and convicted by a majority verdict. This was legal procedure under the law of Hawaii but not legal in any court deriving its authority from the federal government and sitting in a state or organized territory. So if the United States Supreme Court decided at the end of the two years that the constitution had gone into effect in its entirety the moment Hawaii was annexed, the jails would have been opened and Mankichi with many others would have been set free. The court, however, took a sensible view, and decided, Mr. Justice Brown writing the opinion, that during the period of transition the fundamental rights were guaranteed to all the inhabitants of the newly acquired territory of Hawaii, but the rights to grand and petit jury were not fundamental. Thus the decision of the Downes case was reaffirmed which made a distinction between fundamental rights which must be guaranteed to the inhabitants of all acquired territory and the full rights which are guaranteed only in territories which are made a part of the United States.

Another sequel of the Downes case was Dorr v. United

States,[23] relating to jury trial in the Philippines. By act of Congress in 1902 a temporary government was established in the Philippines. Among the rights guaranteed by the act was that no person should be held for a criminal offense without due process of law. It was expressly declared that the right of jury trial was not extended to the islands. Dorr claimed that he was denied due process by the denial of jury trial, but the court again in 1904 upheld the previous decision of the Downes case, making a distinction between fundamental rights, among which is due process, and rights which may be claimed in territories to which the constitution has been extended, among which is jury trial.

The Philippine Islands are still in this third stage. They were in the second stage nearly three years when Congress passed the first organic act in 1902.[24] The Jones Act of 1916[25] increased the powers of the insular government. The inhabitants are citizens of the Philippine Islands, not of the United States. The constitution with its bill of rights is not extended to them, but the Jones Act contains an improved bill of rights.[26] Grand and petit juries are not imposed upon the Filipinos, but their legislature may adopt a safe and sane form of jury trial, which the constitutional jury, as interpreted by the courts, is not. The islands are not brought into the customs union, for our tariff laws exclude the Philippines. The Jones Act permits their legislature to make their own tariff schedules with a power of veto in the president.[27] Philippine products enter the states free of duty and American products enter the islands free of duty.[28] The Philippines have a government better suited to their advancement than would be a territorial government within the United States.

IV. ADVANCED STAGE: NATURALIZATION OF INHABITANTS WITHOUT INCORPORATION

As congressional government of unincorporated dependency may approach so closely the final stage of complete incorporation that the change to that stage would be scarcely perceptible, it has seemed best, in view of the character of the new government granted Porto Rico, to insert an advanced stage, the distinguishing mark of which is naturalization of the inhabitants. "An epoch-making event in the political history of the island was the approval on March 21, 1917, of the new organic act for Porto Rico. This act was received throughout the island with satisfaction, the people being especially pleased with the grant of United States citizenship." [29] There is no extension of the constitution to the island, but the progressive bill of rights is borrowed from the Philippine organic act of 1916, enlarged and improved for the protection of laborers and children and the prohibition of the liquor traffic.[30] Already Porto Rico under the operation of the Foraker Act had come into the customs union. Porto Rico has every substantial advantage of incorporation into the United States as an organized territory, though it has not been actually incorporated therein.[31] It has also the advantage of not being subjected to an antiquated jury system.

In 1927 the Virgin Islands,[32] acquired by purchase from Denmark, were advanced to this stage. The inhabitants, who are nationals of the United States, are made citizens thereof, and aliens, resident in the islands, may be naturalized under the general laws on that subject. The Virgin Islands are not yet admitted to the customs union.

V. Complete Incorporation of Dependency and Its Inhabitants

Complete incorporation of dependency and its inhabitants is effected when the dependency is admitted as a state or is made by Congress an organized territory within the United States. The Republic of Hawaii petitioned to be annexed as a permanent territory. It may remain a territory two or three generations, but when its people have become thoroughly Americanized they will seek and obtain statehood within the union. Some authorities still classify Hawaii as not fully incorporated into the United States, distinguishing its status from that of Alaska.[33] This is conceived to be a mistake, due possibly to misinterpretation of the Mankichi decision, as if it applied to the period after the act of 1900, extending the constitution to the territory, had gone into effect.[34]

We have seen that the status of Porto Rico and its people would not be improved by making it a territory within the United States. It is not far distant from the mainland and is inhabited by people of European extraction. Though they should not be expected to renounce their Spanish culture, they may become loyally attached to the American government and people. They too may seek and obtain statehood within the union.

The Philippines are almost a world in themselves, far distant from the United States and adjacent to Asia. They are of a different race and distinct culture. Yet when a political connection has been found mutually beneficial, and promises to be so in the future, it should be perpetuated, but in a form that permits the realization of national ambitions. If the British Empire permits its dominions to become equals with the mother country without change of legal sovereignty, may not the great western republic permit its far eastern dependency to pass from tutelage to complete self government, without disturbing the location of legal sovereignty?

[1] Toyota v. United States, 268 U. S. 402 (1925).

[2] 21 Wall. 162.

[3] Coudert, F. R., *Certainty and Justice*, p. 136.

[4] De Lima v. Bidwell, 182 U. S. 1 (May 27, 1901); Downes v. Bidwell, 182 U. S. 244; first Dooley case, 182 U. S. 222; second Dooley case, 183 U. S. 151.

[5] Dooley v. United States, 182 U. S. 222.

[6] 9 How. 603.

[7] 180 U. S. 109.

[8] 182 U. S. 1.

[9] 182 U. S. 222.

[10] 9 How. 603.

[11] 16 How. 164.

[12] 182 U. S. 222.

[13] 192 U. S. 1.

[14] 183 U. S. 176.

[15] *Compiled Statutes to 1918*, Sec., 5291.

[16] Price, H. B., in *American Year Book* for 1926, p. 222. McIntyre, F., in *American Year Book* for 1925, p. 219 (recommending citizenship for natives).

[17] Bryan, H. F., in *American Year Book* for 1926, p. 224. Hartt, B. A., in *American Year Book* for 1927, p. 149.

[18] 182 U. S. 244.

[19] 183 U. S. 151.

[20] 190 U. S. 197.

[21] Thorpe, F. N., *The Federal and State Constitutions, Colonial Charters, and other Organic Acts*, Vol. II, p. 879.

[22] *Compiled Statutes to 1918*, Sec. 3648.

[23] 195 U. S. 138.

[24] *Compiled Statutes to 1918*, Sec. 3804.

[25] *Ibid.*, Sec. 3804a.

[26] *Ibid.*, sec. 3810.

[27] *Ibid.*, Sec. 3812a.

[28] *Ibid.*, Sec. 5294.

[29] McIntyre, F., in *American Year Book* for 1917, p. 224.

[30] *Compiled Statutes to 1918*, Sec. 3803aa.

[31] *Ibid.*, Sec. 3749. Balzac v. People of Porto Rico, 258 U. S. 298 (Apr. 10, 1922).

[32] Hartt, B. A., in *American Year Book* for 1927, p. 146.

[33] Hall, J. P., *Constitutional Law*, p. 69. Ogg and Ray, *Introduction to American Government*, p. 478.

[34] 190 U. S. 197.

CHAPTER XIV

THE STATUS OF ALIENS

1. *The Relation of Non-Citizen Nationals to Aliens*

The United States ceased to be a hermit nation and became conscious of its world mission in the year 1898. The mild and generous McKinley led the two houses and the people to the adoption of an imperialistic program which was clearly constitutional. Fortunately the treaty with Spain, the Newlands resolution, and the several acts of Congress were sustained by the Supreme Court, though by a narrow margin. Had the court been quite as logical, statesmanlike, and strictly legal as the political departments the position of the administration would have been sustained in all the cases, but the general result was in a large way satisfactory and just. The country has been enabled to contribute to the well-being of the world.

Having discussed the status of all persons who owe permanent allegiance to the United States, whether citizens or non-citizen nationals, there remains one class to be considered, aliens. They are persons who owe temporary allegiance to the United States. As persons they are protected by the national and state constitutions, as nationals of other states they are protected by treaties both in time of peace and war, and they are governed by statutes, federal and state, as well as by common law. Questions involving their status have a larger importance than ever before.

2. *The Right of Aliens to Enter the United States*

Grotius and many other authorities on international law asserted the right of any person to move from one country to another.[1] The first Constitution of Pennsylvania, adopted in 1776, declared, "That all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness."[2] The second constitution of the state, adopted after the new federal constitution had gone into effect, declared in its bill of rights, "That emigration from the state shall not be prohibited."[3] According to Bonfils the right of emigration is absolute and imprescriptible.[4] Formerly Russia was alone in refusing to recognize this right. The policy of the Tsars is continued by the Soviet. Says Gregory, "The difficulties in the way of emigration were . . . maintained until the war, and since the peace they have been increased."[5] Now Italy has joined Russia in this "keep-your-people-at-home policy." Mussolini maintains that it is necessary "to restrict emigration, as by every man who emigrates Italy loses a soldier, and all that she has spent on his education and up-bringing."[6] Many countries that recognize the right of emigration qualify their recognition by regulations to prevent the violation of their conscription laws or of obligations of a personal nature the breach of which would bring burdens upon society. It may be questioned that the right of emigration is an absolute right.

Though American law has been emphatic, as we have seen, in the assertion of the right of emigration, it has from the very beginning qualified the right of immigration. Bonfils, also, who was strong for the right of emigration, held that the right of immigration is subject to restriction and prohibition.[7] W. T. Colyer, the English radical, whose deportation was ordered by the Department of Labor, but who was set at liberty by Judge Anderson[8] of the federal district court, said in a pamphlet: "The alien immigrant of 1921 has exactly the same kind of right to come to America that the Pilgrim Fathers of 1621 and other early settlers had."[9] He contended that the density of population is less here than in every European country. Therefore the alien has the right to come here. The alien agitator, according to Colyer, is superior in culture to the native workingman, and comes to deliver him from welfare workers and Americanization propaganda, and to proclaim to him that Soviet Russia is the only country yet governed by the working class in its own interest, and that in Soviet Russia a foreigner becomes a citizen by performing useful work. Colyer may be answered by the suggestion that if the right of immigration is not rounded out by the right of emigration the ardent convert to Sovietism may find that he has been entrapped in a grinding slavery. Most countries with a surplus population recognize the right of emigration and urge too the right of their people to settle in countries of large natural resources and relatively small population. On the other hand countries of immigration fear the subversion of their institutions and culture by mass immigration and the interference in their domestic affairs by foreign governments to which the immigrants still owe allegiance. For this reason some countries of immigration refused to send delegates to the conference at Geneva, called to discuss the problem, and others withdrew from it because the conference seemed to be dominated by the point of view of countries of emigration.[10] In all our history, both colonial and national, there has been the exercise of the right, exercised by every nation, to receive or reject those who knock at the door. Though the need of immigration was great when the continent was all but vacant, there was the vigorous assertion of the natural right of society to regulate by law the coming of men and goods through its ports. At the same time there was the ample recognition of the right of the individual to come and go as he pleased, but there was the necessary conjunction of the will of the individual and the will of society. There is a natural right of emigration, on which there is little restriction, so necessary is this to liberty. There is a natural right of immigration but this must yield in case of disagreement to the natural right of society to protect itself which right alone is absolute. A happy marriage requires the consent of both parties concerned.

3. *The Laws of the United States on Immigration*

On Feb. 5, 1917, Congress passed an elaborate immigration law [11] over the veto of the president. It provided for a literacy test,[12] much objected to by the president, and many other limitations were included, most of them in continuance of former policy. The immigration of Chinese coolies was already forbidden, but now in view of a threatened deluge from other Asiatic lands a barred zone was created which included India and the smaller countries of Indo-China and the tropical islands occupied by Malays and other races. This law did not prohibit the immigration of Filipinos and other nationals, and the barred zone did not include Japan, for the gentlemen's agreement as to Japanese laborers still operated to exclude them, or was intended to do so. The law contained detailed provisions for the physical and mental examination of alien immigrants, and for a record of all the pertinent facts of their life stories, especially as to their attitude to government, and their liability to become public charges. The law provided that if any alien within five years after entry came within any one of a long list of disqualifications, such as conviction of crime, connection with prostitution, advocacy of unlawful destruction of property, or teaching anarchy, he should be taken into custody upon warrant of the Secretary of Labor and deported. Thus aliens were admitted conditionally and were liable to deportation if found to be unlawfully in the country.[13]

The Great War operated to make all Europe a barred zone, but at its conclusion reports came from many lands of a contemplated exodus which brought panic to the Bureau of Immigration and related services of the government. There was a demand throughout the country for prohibition of immigration and a bill was introduced by the Hon. Albert Johnson, chairman of the House Committee on Immigration, for this purpose. Various interests protested, as the farmers of Florida who were dependent on Nassau negroes, the ranchers of Texas and Arizona who were equally dependent upon seasonal workers from Mexico, as were also the lumber interests along the northern border dependent upon workers from Canada. Building interests throughout the country protested.[14] Hebrew societies were very active in opposition. The experts of the Labor Department and the State Department testified that the program of the bill was faulty in the extreme. They advocated a selective policy which would admit those aliens alone who were really needed in this country and their distribution to meet the needs. These specialists would avoid congestion in the cities and in trades where there was unemployment, and would direct the settlement of immigrants in agricultural districts where labor was in demand. The effort would be, if possible, to avoid the tragedy of rejection here by examination and selection in the home lands. But there were practical objections against such a constructive but revolutionary program, especially diplomatic difficulties,[15] and the time element. It was felt desirable to limit immigration from the south and east of Europe and yet to do this with no discrimination against any nationality as such. A plan, thus conceived, would be a happy solution of the Japanese problem. Such a bill was finally drawn, combining features of several bills. It became a law May 19, 1921. It was enacted, " That the number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910." [16]

Under the quota provision of this law of 1921 somewhat over 350,000 immigrants were admitted but the total number permitted to enter under the law in some years exceeded 700,000. Therefore it was felt that the law should be amended by making more effective the execution of its policy, namely, the decrease in the number of immigrants and the restoration of the former preponderance of Nordic elements.[17] To these ends the law of May 26, 1924, reduced the percentage to two and changed the census basis to 1890. The quota limit was thus brought down to 160,000 approximately. In fact in the first year the actual number admitted under the quota was less than this, though the total number admitted under all provisions of the law exceeded 450,000. The non-immigrant class included among its several categories alien seamen temporarily entering the United States and aliens entitled under existing treaties to enter solely to carry on trade. Among the non-quota classes were the immigrants from Canada, Newfoundland, and the republics of Latin America and, strangely enough, students who, since their admission is temporary, are properly not immigrants at all. The permission granted alien seamen has been sorely abused. The curtailment of immigration from Europe has stimulated immigration from Canada and Mexico beyond all expectation. One of the provisions of the law most criticized for its callous indifference to wounding the national pride of a friendly people, was to this effect that, " No alien ineligible to citizenship shall be admitted to the United States unless such alien " is an " immigrant previously lawfully admitted . . . who is returning from a temporary visit abroad," is a minister or professor, or student, or is the wife or child of such minister or professor, or is a non-immigrant, like a government official or merchant. This measure gave serious offense to Japan, and was unnecessary as the quota constituted a sufficient bar. The provision which has excited the most animated debate is the following: " The annual quota of any nationality for the fiscal year beginning July 1, 1927, . . . shall be a number which bears the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin . . . bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be 100." The execution of this command was repeatedly postponed, but July 1, 1929, was put into effect.[18]

4. *Appraisement of the Policy of Restricted Immigration*

How do we evaluate the effectiveness and justice of the policy thus embodied in law? There is well-substantiated evidence[19] to support the proposition that immigration does not appreciably increase the population of a country, certainly not in the proportion of the old stock to the immigrants and their descendants.[20] Even where the latter greatly exceed in number the former it is possible that the population would have been as great as it is, had there been no immigration at all. Where certain kinds of labor, unskilled and originally ill-paid, have been monopolized by aliens, the old stock regards such labor as beneath its dignity.[21] Even the children [22] of aliens will avoid such labor, if possible, as tainted by its connection with a servile class.[23] A constant inflow of immigrants is necessary to supply the needs of industry when assigned to the lower grades of a caste system.[24] With the field of opportunity more and more constricted and the need of increased income to retain one's rank in society becoming more and more urgent, the old stock reaches these ends measurably by cutting down the birth rate.[25] Thus the well-born have few or no children and the ill-born and aliens have many. This change came after 1830 as the result of the old immigration. Protest became loud and bitter, and organized itself as the Native American party. In the clash of the Civil War this issue was buried for a time. It is possible that the old immigration gave preponderance and victory to the North, and it is possible that there would have been the same preponderance had there been no accelerated immigration at all. The old immigration was from the British Isles, Scandinavia, and Germany. But after 1882 the remarkable expansion of manufacturing and the cheapness of ocean transportation brought a vast horde from southern and eastern Europe. However worthy were the great majority [26] of these people individually, they were too numerous to be assimilated. In many localities American civilization was trampled down and almost everywhere it has been degraded. Criticism of the new immigration became more general and less embittered than the old-time criticism of the immigration of that day, and the result was the legislation which has been outlined.[27]

In any just appraisement of the law emigration from other lands must be studied as well as immigration to our own, for there is a world citizenship as well as the American. President Coolidge[28] recognized that the needs of aliens must be considered as well as the welfare of the United States. People in an overpopulated country have a moral right to room somewhere in the wide world. Race suicide in France is attributed not to immigration but to the Napoleonic law of inheritance. In the effort to correct the excessive division of land by cutting down the birth-rate the population of the country has been too much reduced. The result has been a large immigration of Italians, Spaniards, Belgians, and Poles.[29] Russia has in the Siberian steppes a vast territory, resembling Canada and the bordering states, to which she endeavors to direct her own surplus population and to which she welcomes the Slavs of eastern Europe.[30] Canada, burdened by the too-rapid extension of her railroads, welcomes the peoples of northwestern Europe and the new peoples of the provinces, recently severed from Russia.[31] Brazil has received immense numbers of Italians, Portuguese, and Spaniards, locating them and smaller numbers of Germans in distinct communities in the southern states where they are free from competition with Brazil's own colored population and where they preserve their native culture.[32] Italy demanded a measure of control of her nationals resident in Brazil which Brazil deemed an encroachment on her own sovereignty. Italian emigration to Brazil ceased, and the Italian government now discourages all emigration. Argentina welcomes European immigrants and gives them free entertainment in a great hotel and assists their location on her vacant lands. Great Britain has by far the largest surplus population of any European country, due to the loss of her markets in the Great War. Present relief can be found only in emigration. The Empire Settlement Act of 1922 created a fund of £34,000,000 to assist emigration to the dominions. Canada and Australia are assuming additional financial burdens to promote the enterprise. Young townspeople are sent to training schools and afterward settled in Canada with great success.

Group colonies are established in Australia where settlers are paid wages to clear their own lands and are assisted at very considerable expense till they are established and able to reimburse the fund.[33] The surplus town population of Great Britain cannot be sufficiently relieved by this placement on agricultural land. A large industrial population, speaking our language and sharing our ideals, would gladly find refuge in this country. The immigrants from Great Britain and Ireland are of all aliens the most like the majority of our own people. The adaptability of the Irish is humorously represented by the story of the forlorn son of Erin who, before the ship that brought him sails out of the harbor, has been elected to the common council and is "inthrojucing" a bill. In a week's time an Englishman would pass for a native-born American.

The immigration act of 1924 directed the preparation of temporary quotas for three years, which would have no very accurate correspondence with the relative elements of the population. It was hoped that in the mean time a more accurate quota could be computed in which each element of the population in 1920, on the basis of national origins, would have placed over against it the proper proportion of the 150,000 quota immigrants permitted each year. Professional experts were set at work under a committee of the cabinet. Though the cabinet members stated that they could not vouch for the accuracy of the figures, the computation reached is approximately true and according to those best able to judge "there need be no longer delay for fear of gross inaccuracy." [34] The quota thus computed is assuredly more representative of the whole population than any computation based on the foreign-born population of any single year. In this computation Great Britain and Northern Ireland are assigned a quota of 73,000 while in the temporary quota the same countries are assigned only 34,000. In 1928 very desirable British immigrants, recent graduates of the University of Pennsylvania, were obliged to wait in their consular districts two years before their names were reached. The same was, of course, true of the common laborers who desired to come and who were needed in industry, and whose coming would not mean menace to our institutions. All other nationalities have their just proportion in the number to be admitted, with the result that the immigration of each year will make no change in the composition of the population. Each nationality will have a vested interest in its established share in the citizenry of America.[35]

Possibly disproportionate attention has been given to the quota, when actually a far greater number enter the country as non-immigrant aliens or non-quoto immigrants. The vast increase of immigration from Mexico and Latin America defeats or threatens to defeat the very purpose of the law, which is to protect the population from excessive introduction of dissimilar elements. It has therefore been earnestly proposed that the quota system be extended to the countries of the Western Hemisphere.[36] A vast number [37] of aliens are in the country illegally, who have come like liquor and opium by the bootlegger's route. All aliens should be required to register [38] and all illegally in the country, not protected by the statute of limitations, should be deported.[39] Many sailors who lost that character as soon as they obtained shore leave would become sailors again.[40] On the other hand skilled laborers, needed in industry, should have immediate entry.[41]

A reform,[42] long advocated by humanitarians, has been unobtrusively established without amendment of the law. This is the examination of aliens abroad. "One of the notable achievements in recent times was the experimental tests of 1925 of the practicability of giving prospective immigrants primary examinations in their own countries. Originally begun in Great Britain and the Irish Free State by stationing immigration and public health service officers at American consulates there, the system proved so successful that the service has been extended, at the request of the respective governments, to a number of countries on the continent of Europe." [43] So successful has this advisory service become that rejections in our ports of immigrants thus approved have been reduced to a minimum.

One provision of the act of 1924 had an unforeseen application. North American Indians, born in Canada, are not eligible to citizenship, and therefore under the letter of the law of 1924 may not enter the country as immigrants.[44] This unintended result was corrected by the decision, March 18, 1927, of the United States district court, sitting in Philadelphia, in the case of United States ex rel Diablo v. McCandless.[45] The court decided that the immigration law was not intended to apply to American Indians, whose right to pass the line at will was recognized by the Jay treaty, and that Congress, though it has the power to exclude them, has not exercised it. This decision no doubt reflects the will of Congress and the nation. It is to be hoped that it will be sustained.

5. *The Right of Aliens to Equal Protection in Private Employment*

Though the problem of immigration is of such absorbing interest that it has seemed imperative to devote the larger part of this chapter to it, many other rights of aliens demand attention. Even if an alien has no legal right to be in the country and nevertheless is here, he is not an outlaw.[46] He is a person and may claim many rights as such. He is subject to deportation, but is entitled to due process which means a fair hearing and charges supported by evidence. "In *habeas corpus* proceedings it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince the court of the essential unfairness of the trial."[47] These deportations have now risen to so many thousands that, "Deportation alone as a punishment for illegal entry into the United States appears to be not sufficient deterrent for repetition of the act."[48] It is therefore suggested that illegal entry be made a criminal offense.[49]

Suppose a feeble-minded woman has been ordered deported, not as one found to be unlawfully in the country, but as an applicant for admission who is rejected, and yet it is difficult in war time to send her back to her country of origin. Under bond she is committed to the charge of her sister, but when ordered produced in court for deportation it is found that she has been married and the very danger to society which it was the purpose of the law to prevent, has befallen it. Ought not the woman and her alien husband to be deported and all the conspirators against the laws to be severely punished, including the Assistant Secretary of Labor who ordered her admission under bond? Judge Hand [50] decided that such a bond was invalid.

But suppose an alien is legally in the country, he is a person protected not only by the Fourteenth Amendment but by almost every provision of the bill of rights. Few are the rights that belong exclusively to citizens.[51] Public rights, like voting, and proprietary rights, like fishing,[52] may be withheld from aliens or granted on such terms as the state imposes, but ordinary civil rights are protected both by constitutions and treaties. This clearly applies to the right of aliens to equal protection in private employment. Arizona learned this when she attempted legislation against Mexican laborers, requiring the employment of a certain percentage of citizens.[53] Yet there are occupations which involve danger to society and therefore may be restricted to citizens under the police power. This was permitted formerly in the case of saloon-keepers [54] but laws applying this principle to barbers [55] and blacksmiths [56] have not been sustained.

6. *The Right of States to Discriminate in Public Employment*

Where the state is the employer, either directly or indirectly through its subdivisions or agents, it may employ whom it will.[57] It may restrict employment to its own citizens or to citizens of the United States. Aliens may assert no rights here.

7. *The Right of Aliens to Purchase and Inherit Real Estate*

At common law, says Wise, an alien "may take real estate by act of the parties or by deed or grant, or devise, or by other act of purchase, but cannot hold it except upon such terms as may be prescribed by the state."[58] Though he may take by will, he may not take by descent, and he cannot transmit his land by descent but it vests immediately in the state. In theory, at least, our states began with this system, and some few states still hold to it, but "Massachusetts, Ohio, and Wisconsin are three states which have removed the disabilities of aliens with respect to the possession, enjoyment, or descent of property."[59] Between these extremes a great variety of law may be found. The peculiar land laws of the Pacific coast, directed against aliens ineligible to citizenship, have been treated in the chapter on orientals.[60] All these discriminations against aliens would appear to be in violation of the equal protection clause of the Fourteenth Amendment, but that amendment, interpreted in the light of the history of the times, was not intended to invalidate the land laws of the majority of the states and of the United States. Treaties may override state law upon inheritance and purchase of land and property in general,[61] but when Canada failed to adhere to a treaty made between the United States and Great Britain Canadian heirs could not inherit property which by state law would not fall to them.

8. *The Treaty Rights of Aliens to Peace, Order, and Safety*

Under the constitutional bill of rights alien friends and even alien enemies have rights, but treaties also guarantee them rights in peace and also in war. Says Wise, "The status of citizens of one country residing in or traveling through foreign countries is frequently the subject of treaties between their respective nations; such treaties, when made, are the supreme law of the land, and any state law denying to an alien the right secured by such a treaty would be unconstitutional, null, and void."[62] Under stress of local passion state officers sometimes fail to enforce the treaty rights of aliens. President Harrison in his message to Congress in 1891, referring to the lynching of Italians in New Orleans, said: "Some suggestions growing out of this un-happy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in federal courts." [63] He proposed that state officers should be made federal agents and answerable for their acts. This is sometimes called the indirect method of protecting the treaty rights of aliens. Another proposition is for the adoption of the direct method, by which proceedings could be instituted in federal courts directly against the parties who invade the treaty rights of aliens. There is strong opposition against this so-called federal invasion into the proper sphere of the state government by either method, but Willoughby thinks it valid and quotes decisions [64] that, " A law which is necessary and proper to afford this protection is one that Congress may enact because it is one needed to carry into execution a power conferred by the constitution on the government of the United States exclusively."

9. *The Right of Aliens to Naturalization in the United States and Their Duties in Relation Thereto*

The complement of immigration is naturalization. If there is a natural right of entry, so there must be of admission to citizenship. If society has a superior natural right to reject immigrants, so it has to reject petitioners for naturalization. There is no constitutional right of immigration or naturalization, but there is constitutional power in Congress to regulate and prohibit immigration and naturalization. Yet aliens may be said to have a legal right to naturalization which Congress has created by law, and they are entitled to due process in the determination of their right thus created. Due process is not necessarily judicial process, but Congress has made naturalization a judicial function.[65] Industrial radicals sometimes claim that they are citizens because they are engaged in industry, but economic participation does not legalize their presence if there is not conformity with the immigration laws, and such participation does not naturalize them, for naturalization must be in conformity with the laws of Congress on the subject. It is dangerous to democratic institutions to permit the presence of aliens in violation of the immigration laws. It is more dangerous to tolerate the presence of millions of aliens who are hostile to our institutions and laws and spurn the offer of citizenship.[66] Visitors from foreign states, seasonal workers, and aliens who represent foreign interests, commercial, cultural, or governmental, properly retain their former allegiance, but immigrants who establish permanent domicile and enter industry owe it to themselves and to the country to prepare for citizenship and when prepared to present themselves for naturalization. They should be treated as foreign princes, heirs of the throne, in training for its occupancy, and they should treat the institutions and laws of their adopted country with the loyalty of sons and the enthusiastic devotion of willing converts.

If the old stock is not submerged but strengthened in its energy and fine moral fiber by the broader sympathies of the old immigration and lightened and cheered by the art and gayety of the new immigration, the American of tomorrow will be the superman of the century.

[1] Gregory, J. W., *Human Migration*, p. 48.

[2] Constitution of 1776, Declaration of Rights, XV.

[3] Constitution of 1790, Art. IX, Sec. 25.

[4] Bonfils, H., *Manuel*, 1912, p. 255.

[5] Gregory, J. W., *op. cit.*, p. 57.

[6] *Ibid.*, p. 63.

[7] Bonfils, H., *op. cit.*, p. 255.

[8] Colyer v. Skeffington, 265 Fed. 17 (1920).

[9] Hearing before Subcommittee of House of Representatives, June 5, 1920, showing William T. and Amy Colyer to be members of Communist Party and in country in violation of act of Oct. 16, 1918 (184284 of 1920).

[10] Gregory, J. W., *op. cit.*, p. 49.

[11] *Compiled Statutes to 1918*, Sec. 4289¼ ff.

[12] Laughlin, Dr. H. H., expert eugenics agent of House Committee prefers mental test to literacy test (33555 of 1923).

[13] Same as 11. *American Year Book* for 1917, pp. 397 ff.

[14] Marshall, R. C., Jr., General Manager of the Associated General Contractors of America, presented the need of construction industry for 300,000 additional common laborers, for 8 or 10 years, mostly Italians. (36691 of 1923) House Com. on Im.

[15] Johnson, Hon. Albert, in speech Aug. 31, 1922, said Italy and other countries had protested against proposed overseas examination.

[16] *Compiled Statutes to 1925*, Sec. 4289½ ff.

[17] Mr. Edmonds, editor of the Manufacturers's Record, Jan. 25, 1923, regrets action of the National Association of Manufacturers in its demand for increased immigration. The Immigration Restriction League demands further restriction than provided for in law of 1921 (36691 of 1923).

[18] *Compiled Statutes to 1925*, Sec. 4289¾ ff.

[19] Chairman L. B. Colt of Senate Committee on basis of increase in England and Sweden concludes that there would be like increase here if immigration were to cease (36691 of 1923).

[20] Stoddard, T. L., *Rising Tide of Colour*, p. 256. Gregory, J. W., *op. cit.*, pp. 19 ff.

[21] Johnson, Hon. A., in speech, Nov. 24, 1922.

[22] Nelson T., of Rising and Nelson Slate Co. of Philadelphia, claims that children of immigrants seek clerical work and will not follow their fathers (36691 of 1923).

[23] Husband, W. W., Commissioner General of Immigration, says the new immigration prevents the revival of the old immigration, as the two peoples will not mix (32890 of 1923).

[24] Graves, O. M., declares that when 5 million were out of work none but Italians would go to his quarries (32890 of 1923).

[25] Senator Johnson of Calif. quotes E. A. Walcott as finding that the decline of American births equals the number of immigrants admitted (p. 74 of 36691 of 1923).

[26] Laughlin, Dr. H. H., finds that recent immigrants present a higher percentage of inborn socially inadequate qualities than do the older stocks (33555 of 1923).

[27] Patten, J. H. asserts that of 14 million foreign-born in the U. S. over a million neither read nor speak our language (p. 87 of 36691 of 1923).

[28] Gregory, J. W., *op. cit.*, p. 204.

[29] *Ibid.*, pp. 44 ff.

[30] *Ibid.*, p. 199.

[31] *Ibid.*, p. 199.

[32] *Ibid.*, pp. 125 ff.

[33] *Ibid.*, pp. 144, 148.

[34] Laughlin, H. H., in *American Year Book* for 1927, p. 490.

[35] *American Year Book* for 1926, pp. 695–716. *Ibid.*, for 1927, pp. 487–501.

[36] Cook, A. E., in *American Year Book* for 1926, p. 700.

[37] Report of Commissioner General of Immigration, year ending June 30, 1921, p. 11.

[38] Laughlin, H. H., advocates annual examination of immigrant till his naturalization (p. 758 of 33555 of 1923). Freund, E., in *Police Power*, holds registration constitutional.

[39] Risley, T. G., in *American Year Book* for 1925, pp. 711–714. Crist, R. F., in *American Year Book* for 1926, p. 712.

[40] Cook, A. E., in *American Year Book* for 1926, p. 701.

[41] Fisher, T. M., Inspector, says the limitation is three years for entry without inspection and five years for liability to become a public charge, p. 19 of Hearing of Mar. 30, 1920 (180165 of 1920). Yet there is no time limit on deportation of dangerous aliens, and ought to be none on those who enter surreptitiously. *American Year Book* for 1927, p. 493.

[42] Emery, J. A., General Counsel of National Assoc. of Manufacturers, favors determination of admissibility in port of embarkation, p. 4 of hearing of Feb. 20, 1923 (36691 of 1923). Johnson, Hon. A., in speech Aug. 31, 1922, advocated examination abroad.

[43] Cook, A. E., in *American Year Book* for 1926, p. 703. Cook, A. E., in *American Year Book* for 1925, pp. 708–710.

[44] *American Year Book* for 1927, p. 494.

[45] 18 Fed. (2d) 282.

[46] Bonham, R. B., Inspector, thinks that aliens have few constitutional rights, Mar. 30, 1920 (180165). Vaile, Hon. W. N., in committee hearing of Mar. 30, 1920, remarks that persons most opposed to our institutions are most insistent on their constitutional rights (180165).

[47] United States ex. rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103.

[48] Cook, A. E., in *American Year Book* for 1927, p. 494.

[49] *Ibid.*, pp. 494, 495. Second illegal entry is made a crime by Act of June 24, 1929.

[50] In re Caterina Pace, who arrived at Ellis Island Feb. 13, 1917, and was illegally released under bond by Assistant Secretary Post, p. 22, hearing of May 4, 1920 (186612). The case of U. S. ex rel. Sejnensky v. Tod, 285 Fed. 523, is a reprehensible judicial decision of the same character as the Pace case.

[51] Cleveland, F. A., *American Citizenship*, pp. 152 ff. Ex parte Kotta (Calif. 1921) 200 Pac. 957. *Contra* — State v. Sinchuk (Conn. 1921) 115 Atl. 33.

[52] Corfield v. Coryell, 4 Wash. CC 371 (1825). Ex parte Gilletti, 70 Fla. 442 (1916).

[53] Truax v. Corrigan, 257 U. S. 312 (1921).

[54] Tragesser v. Gray, 73 Md., 250. In Ohio only citizens may operate pool rooms, Ohio ex rel. Clarke v. Deckeback, 274 U. S. 392.

[55] Templar v. State Board, 90 N. W. 1058 (Mich.).

[56] Bearth v. People, 193 Ill. 334.

[57] Commons and Andrews, *Principles of Labor Legislation*, p. 13. Illinois Rev. Stat. ch. 6, Sec. 12–17. Alger, G. W., *The Old Law and the New Order*, pp. 97 ff.

[58] Wise, J. S., *American Citizenship*, p. 270.

[59] Cleveland, F. A. *op. cit.*, p. 139.

[60] Terrace v. Thompson, 263 U. S. 197 (1923). Porterfield v. Webb, 263 U. S. 225 (1923). Webb v. O'Brien, 263 U. S. 313 (1923).

[61] Cleveland, F. A., *op. cit.*, p. 141.

[62] Wise, J. S., *op. cit.*, p. 272.

[63] Willoughby, W. W., *Constitutional Law*, p. 256.

[64] United States v. Arjona, 120 U. S. 479.

[65] Tutun v. United States, 270 U. S. 568 (April 12, 1926).

[66] Crist, R. F., There are about two declarations of intention for each petition for naturalization. Over 7 million aliens have not acquired citizenship. In *American Year Book* for 1927, p. 499.

CHAPTER XV

RELIGIOUS LIBERTY

1. *Status and Fundamental Rights*

The first half of this book is devoted to Status, the second half, to Fundamental Rights. The one deals with abnormal law, the other with normal law. The preceding chapters in treating the various classes of persons born in the United States followed in the main the historical order as the problems concerning them arose and were debated in the country as great social and political issues. This and the remaining chapters will, in the main, follow the order of subjects as they occur in the federal bill of rights, which is often the historical order, but when related provisions are brought together under a comprehensive principle, or when the logical connection of topics suggests a departure from the order adopted, the suggestions of convenience will be followed.

2. *The Constitutional Guaranty*

The First Amendment of the federal constitution prescribes that, " Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The amendment, thus beginning, was proposed to the legislatures of the several states by Congress in 1789 and was ratified. In effect it was a part of the original constitution as the constitution was adopted upon the strength of an understanding that this and other amendments would be proposed and submitted to the states.

The constitution of Pennsylvania declares that, " All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship."[1] This provision is traced back in identical language to the constitution of 1790 and is substantially the same in the first constitution, adopted in 1776.

There are similar limitations on the power of state legislatures in every other state constitution now in force. The federal constitution restrains Congress; the state constitutions control the state legislatures. The result is complete constitutional guaranty of religious liberty.[2]

3. *Repressive Sectarian Legislation*

The constitutional guaranties of religious liberty were not adopted in a spirit of indifference to the claims of religion but in recognition of its importance. Religious liberty, however, or even toleration, was not always the rule in America, or England, or Europe. John Fiske[3] has shown that religion was one of the greatest forces in the evolution of man. Accordingly religion was a tribal affair,[4] a state affair, and universally there was the union of church and state. The Puritan fathers came not to establish religious liberty, but a commonwealth founded upon religion in the one form which they considered altogether true.[5] The world has never known a finer race of nation builders than the Puritans. Their intellectual and moral stamp was impressed deeply and for all time upon New England. Though their last descendant dies, the printed story of their splendid manhood will beget sons to the Puritans and their red-blooded virtues will live again. Out from Massachusetts went Roger Williams, the Baptist, to establish in Rhode Island the first state in all the world founded on the principle of religious liberty.[6] Lord Baltimore, the Roman Catholic, made a sincere attempt to establish religious toleration in Maryland.[7] William Penn on a larger scale made freedom of religion a fundamental principle of his colony.[8] His Holy Experiment attracted the persecuted of many lands.

4. *Support of Church Out of Public Funds*

The early history of these three colonies appeared to demonstrate to the minds of contemporaries the error of the principle on which they were established. But in those which persevered in the experiment the voluntary system proved itself able progressively to meet the religious needs of the population quite as satisfactorily as did the system of state support of religion in other colonies. Religion in colonies of the voluntary system gave its aid to law enforcement, and contributed to the morality, sobriety, and sturdiness of the people. Men who were guided by religious principles, voluntarily adopted and propagated, acquired a spirit of initiative and independence which made their religious principles and practises the precursors of democratic principles and practices in civil government. Religious liberty and democracy when not precursors one of the other, are concomitants of each other. The system spread from Rhode Island and Pennsylvania to the whole union, passing through the stages of toleration, freedom of religion, and separation of church and state, though this stage was not reached in some states till long after the Revolution, in Massachusetts not fully till 1835.[9]

In connection with the French Revolution the doctrine of religious liberty was introduced in Europe and gradually gained ground till nearly all the world accepts it, and many states at the conclusion of the world war reached the ultimate goal of separation of church and state. It is not always a gain for people not yet trained in private initiative and responsibility to suddenly and completely separate church and state. The natural system was the system which the world had always known and which contributed to the discipline of developing men, but the better system when society has advanced to maturity is freedom in religion as it is also democracy in government. When that stage is reached religious liberty appears as a natural and indefeasible right.

A number of our states after guaranteeing religious liberty in their constitutions still continued their support of religious establishments in accordance with settled law and custom. But this favoritism was felt to be inconsistent with real religious liberty. The Baptists of Rhode Island and the Quakers of Pennsylvania had from the first proclaimed the doctrine of a free church in a free state. Therefore now no American state employs the power of taxation to support one form of religion or a number of forms. There is entire separation of church and state. Nevertheless the importance and necessity of religion are quite as great to-day as ever before.

5. *Religious Disqualifications*

It is well known that Massachusetts in the early colonial period persecuted Quakers and Baptists.[10] As late as 1764 the legislature of New York was debating what to do with the fines and forfeitures imposed on Moravians [11] and Quakers. In that colony at that time Presbyterians and Lutherans could not obtain incorporation for their churches, a privilege freely granted to Church of England and Dutch Reformed churches. New Jersey under the proprietors, who were for the most part Quakers, had been so liberal that in 1690 it had in John Tatham [12] a Roman Catholic governor, yet in the administration of Lord Cornbury,[13] when New Jersey had become a royal colony, Quakers were persecuted. In the second half of the eighteenth century Presbyterians and Baptists were persecuted in Virginia.[14] But when repressive sectarian legislation and administrative oppression had given place to toleration and this had ripened into full religious liberty, still there were religious disqualifications, inconsistent with liberty.

Says Freund, " Freedom of religion is impaired by the requirement of religious profession of some sort for the exercise of public functions." [15] Thus New Hampshire, North Carolina, and South Carolina excluded non-Protestants from office. Pennsylvania prescribed an oath or affirmation which only Christians could take. Even at this day Maryland and a number of states exclude atheists from public office. An old law has been in force in Massachusetts which disqualified atheists from acting as witnesses.[16]

On the other hand the national constitution provides that, "No religious test shall ever be required as a qualification to any office or public trust under the United States." [17] The present constitution of Pennsylvania prescribes that, "No person who acknowledges the being of God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." [18] This provision does not actually disqualify atheists, but it marks them for legislative disqualification. Atheism is a real disqualification but there should never be legal disqualification, for then there will be no real religious liberty. An avowed atheist is better fitted for office than a hypocrite, made so by law.

6. *Recognition of Religion*

If religious disqualifications are inconsistent with religious liberty, is the recognition of religion consistent therewith? The state acknowledges the religious sentiment of the people in certain of its official utterances, such as the reference to the divine power so general in state constitutions, the proclamation of thanksgiving days, the use of the religious sanction of the oath, leaving a right of affirmation where the oath is objected to, and the recognition of the religious celebration of marriage. But in all these cases the state neither compels nor restrains. There is no violation of religious liberty.[19] The employment of chaplains in penitentiaries, in the army and navy, in Congress, and in many state legislatures is sanctioned by long usage. The men appointed to these services, whether ministers, priests, or rabbis, use the language of their several schools to present the same great ideals which the experience of the ages has proved true. Legislators do well to join in petitions for high guidance, but they are not compelled. The armed youth need an inner self-directed discipline which military rules cannot give them. Prisoners need friendship and a boost to better things. There is intellectual relaxation at least, and the possibility of help which each person accepts or rejects, as he wills. Yet a prisoner appears to have a constitutional right not to be compelled to attend a religious service against his will.

7. *Protective Legislation*

Since religion is one of the primal forces of society, and the privilege of teaching and practising its tenets is one of the most valued rights of freemen, it is the duty of the state to enact protective legislation, such as regulations for the protection of religious meetings from disturbance by disorderly conduct. The debt of government to religion is so great that it should be regarded as the most important of the various cultural agencies which are not supported out of the public treasury, but by private contributions, and are conducted under private trusts or charters, not for profit. These cultural agencies are churches, colleges, hospitals, orphanages, homes for the aged, museums, art galleries, and similar institutions, classed together as religious, charitable, and educational. Though they conserve life, fit men for larger usefulness, and thus indirectly add to the wealth of society, they are not directly wealth producers; their income is not a part of the total income of the people, out of which the costs of government may properly be paid. Rather are they services which historically have been considered of a public nature for the state or the state church to support. They should not be taxed, for taxation would force into direct political intrigue their supporters. Many fine ecclesiastical buildings are public monuments of cultural, artistic, and historical value, yet their present congregations could not possibly pay taxes assessed on the present value of the real estate. Churches add immeasurably to the richness of life, to the obedience of law, and to the thrift and economic competency of the people, but their construction does not actually remove what was taxable property to the nontaxable; it simply pushes out the area devoted to residences and other urban purposes, and increases the value of all taxable property. Property which is employed solely for religious, cultural, and charitable purposes, of a non-profit nature, should not be taxed.[20]

When a religious denomination builds and maintains an orphanage or home for the aged, and thus by the generosity of its members and friends gives support to those who otherwise might become public charges, ought such an institution to be taxed unless it can show that a part of its beneficiaries are not members or adherents of the denomination, but are received in preference to many deserving poor of the denomination for whom it was professedly built? The very suggestion is irrational if it were not based on actual rulings of the courts.[21]

When a hospital, owned and maintained by a private corporation or a religious denomination, gives free service to patients unable to pay, on the same basis exactly as the service given by publicly owned hospitals, supported by taxation, ought not the state to pay for such hospital service which otherwise would fall wholly on the state? It is not irrational to say that the state may pay for such services rendered by secularly owned hospitals, but not if rendered by denominationally owned hospitals? Such payments would not be in support of religion, but payment for public service rendered. We do not penalize a physician for his religion. Why penalize a hospital? Religious persecution comes back in strange disguises.[22]

8. *Blasphemy*

A form of protective legislation is the law against blasphemy. Christianity was held to be part of the common law of England, and so in America was part of the law of the land. But the ancient rules of the common law must be regarded as abrogated by the constitutional provision for liberty of religion. The freedom of religion demands the freedom of attack, but the right of attack does not justify the violation of public order and decency. So the offense of blasphemy, according to Freund,[23] should not be held to be complete without calumny, detraction, or abusive language. The attack on religion thus becomes blasphemy when its manner and form are so offensive as to constitute a nuisance.

9. *Regulative Legislation*

If religion is to be free, and the believer may propagate his religion, there must be freedom of association, and opportunity for organization and the holding of property. There is the necessity of legislation by the state, which is really for the convenience and protection of the societies, and not for their control. Yet such legislation must act as a restraint, though not intended as such. Sometimes churches are incorporated; again, as in Virginia, charters are denied them, and yet their corporate character is substantially recognized. The laws vary from state to state. Yet everywhere there is a desire to protect and encourage these religious societies. Frequently there are not only general laws for religious organizations, but also special statutes for the various denominations, framed according to their own desires.

In many states there are limitations on the amount of property which may be acquired, especially by devise or bequest. These laws historically are derived from the English statute of mortmain, or dead hand, and often to-day they are called mortmain laws. These laws are held to be proper police regulations for the safety of society, and therefore do not unduly restrain the use of property for religious purposes. It is a restraint on religious liberty, but a necessary one. It is not a violation of the constitutional right.[24]

10. *The Limits of Religious Freedom*

There may be restraint on religious liberty; there are limits, for otherwise one constitutional right by arbitrary claims and formal logic might be so expanded as to cripple necessary powers of government. The constitutional guaranty of religious liberty covers primarily worship and doctrine, and secondarily customs and practices prescribed by religion. Yet the customs and practices are sometimes of such a nature that the police power of the state will prohibit them. Even a form of worship may in some of its features come under the prohibition of the police power. In the realm of religion doctrine or the expression of opinion has greater security than expression of opinion on secular matters. Ordinarily, in secular affairs, incitement to crime is held to be crime itself, but in religion the courts give considerable latitude to expressions of opinion and precept, yet they may sharply condemn the practices which are the result of such opinion and precept.[25]

11. *Practices and Doctrines in Conflict with Public Safety and Order*

The provision is found in many state constitutions that the guaranty of religious liberty shall not excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state.[26] Thus cruelty, debauchery, and polygamy are repressed even when conscientiously practised. This principle was the basis of congressional action against the Mormon church. It was decided in the case of Reynolds v. United States [27] that the constitutional guaranty of the free exercise of religion did not protect the practice of polygamy, even when enjoined as a religious duty.

When the Salvation Army first invaded our country its methods were so different from those usual to this country or to the continent of Europe, whence came a large part of our urban population, that the Salvationists were often rudely and roughly handled, and frequently city regulations were enacted which discriminated against them in a flagrant manner. Now the Salvation Army is honored everywhere. Fair regulations ought to be enforced against all processions which disturb seriously the orderly use of the streets, not protecting religious processions because they are religious or discriminating against them because they are religious.

Any new method of healing arouses the antagonism of those practitioners whose own methods, once challenged as irregular, are now approved as scientific. Yet society must be protected from quacks. Sometimes religious tenets are involved in the method of healing disease, and then the question of religious liberty is injected. Christian Science has brought much trouble to law-makers and administrators. A New York law defined a person who practises medicine as one who treats human disease, and required a license for such, yet this same law provided that it should not apply to those who practised the religious tenets of any church. The act was passed in the interests of Christian Scientists, but difficulty was found in its interpretation.[28]

12. *Conflict Between Civil and Religious Duties*

What a man really accepts as the command of God takes precedence over what he regards as the command of man. He will obey his conscience rather than the state. On the other hand the state cannot resign its sovereignty. The Vermont [29] Supreme Court has very properly declared that the constitutional guaranty of religious liberty was not designed to subjugate the residue of the constitution to the peculiar faith, personal judgment, individual will of any person in respect of religion. There must be a reasonable subserviency to the equal rights of others and to the paramount interests of the public.

Accordingly there is an effort to reconcile civil and religious obligations in the administration of law. Conscientious scruples against the bearing of arms cannot relieve from general military duty, but as a matter of expediency and concession many states excuse from military service on payment of a proper equivalent. The United States law, passed on our entering the war, was drawn along this line. Exemption, therefore, is not a matter of constitutional right.[30]

13. *Sunday Laws*

The validity of laws enforcing Sunday rest is firmly established, but not as religious requirements, only as measures purely secular and civil, measures for order, comfort, and well-being of society. Yet historically the Sabbath rests on religious injunction.

It has been judicially held that religious liberty requires repose on the Sabbath and respect for religious feelings and practices.[31] It might just as properly be held that religious liberty requires the non-imposition of Sunday rest on those who keep another day of rest. There is, it is true, a strong argument for the necessity of uniformity in the day of rest. If it is necessary to choose one day the choice would follow the practice of the vast majority of the people. Where a pursuit, however, is not carried on in public, where the public is not at all disturbed in its day of rest, and where there is no economic advantage taken over others by working seven days in the week, it seems only fair to permit Sunday labor. Then there is respect for religious liberty, as well as for public health, and protection against undue economic advantage.[32] The American Sunday was one of the most beneficent institutions of the country, now all but destroyed by mass immigration from continental Europe.

14. *The Bible in Public Schools*

Religious liberty would seem to require that pupils, on demand of their parents, must be excused from attendance during the reading from the Bible, and this is recognized by the practice of many states. Yet in Maine [33] a different view was taken, where the authorized version was made a text book. In Wisconsin on the other hand it was held that compulsory attendance involved the compulsion of the taxpayer to support religious worship. Some states prohibit the reading of the Bible, and others prohibit the exclusion of the Bible from the schools.[34] But one who does not know the Bible is not an educated man.[35] Every citizen should know it from Genesis to Revelation.

Now that Sunday has been so largely paganized there is the greater necessity that religious and moral training should have a place in the curriculum in the public schools. How may this be obtained without violation of religious liberty? By the adoption of the Gary plan.[36] The state recognizes the need for religious instruction and assigns a place for it in the week's roster. But the denominations provide the teaching and meet every expense, so that not a farthing is taken from the taxes and yet religious training is given to every child, except when parents object, and then the state provides instead secular training for children of objectors. The plan works admirably and tends to cooperation and mutual respect between all kinds and persuasions of men. Religion should be free, but without religion men are not men but beasts.

[1] Constitution of 1873, Art. I, Sec. 3.

[2] Cooley, T. M., *Constitutional Limitations*, p. 576.

[3] Fiske, J., *Through Nature to God*, pp. 131 ff.

[4] Vinogradoff, Paul, *Historical Jurisprudence*, Vol. I, "Tribal Law," p. 345.

[5] Hutchinson, T., *History of Massachusetts*, Vol. I, p. 79: "Toleration was preached against as a sin in rulers which would bring down the judgment of heaven upon the land."

[6] Bancroft, G., *History of the United States*, Vol. I, p. 375. Cook, R. B., *Story of the Baptists*, pp. 198 ff.

[7] McSherry, J., *History of Maryland*, pp. 50 ff.

[8] Janney, S. M., *Life of William Penn*, p. 550. Proud, R., *The History of Pennsylvania*, Vol. I, p. 168, Note. Hutchinson, T., *op. cit.*, Vol. I, p. 387, Note.

[9] Freund, E., *Police Power*, p. 490.

[10] Backus, I., *History of the Baptists*, Vol. I, pp. 173 ff.

[11] Hastings, H., Ed., *Ecclesiastical Records of the State of New York*, Vol. 6, p. 3960.

[12] Smith, S., *History of New Jersey*, Appendix II, Article by J. D. McCormick, p. 575.

[13] *Ibid.*, "Address to Gov. Hunter," p. 377.

[14] Maxson, C. H., *The Great Awakening in the Middle Colonies*, pp. 99–103, 131–138. Eckenrode, H. J., *Separation of Church and State in Virginia*, pp. 31–40.

[15] Freund, E., *op. cit.*, p. 490.

[16] Cooley, T. M., *op. cit.*, p. 591. There is a tendency to do away with the common law rule as to credibility of unbelieving witnesses.

[17] Article VI, Paragraph 3.

[18] Constitution of 1873, Art. I, Sec. 4.

[19] Cooley, T. M., *op. cit.*, pp. 582 ff.

[20] Hall, J. P., *Constitutional Law*, p. 180.

[21] Constitution of Pennsylvania, Article IX, Sec. 1: "The General Assembly may, by general laws, exempt from taxation . . . actual places of religious worship . . . and institutions of purely public charity." The statute, passed under this article, orders that all institutions of benevolence or charity, main-

tained by public or private charity, are exempt from all taxes. The Pennsylvania Supreme Court, Feb. 23, 1920, decided in Board of Home Missions and Church Extension of the Methodist Episcopal Church v. Philadelphia that a charity controlled by a particular religious denomination is a purely public charity as long as its ultimate object is to keep an indefinite number of persons without regard to their religious belief. 260 Pa. 405.

[22] Pennsylvania Constitution of 1873, Art. III, Sec. 18: "No appropriation . . . shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association." Collins v. Kephart, 271 Pa. 428 (1921). Collins v. Lewis, 276 Pa. 435. Busser v. Snyder, 282 Pa. 446. Collins v. Martin, 290 Pa. 388 (1927). Trost v. Manual Training School for Boys, 118 N. E. 743 (Ill. 1918). This is a Roman Catholic institution to which county courts committed children. Only Roman Catholic children were required to attend the Roman Catholic religious service. The court decided the money was paid for the support of each child and not for the aid of a sectarian school.

[23] Freund, E., *op. cit.*, p. 494. Cooley, T. M., *op. cit.*, pp. 584 ff.

[24] Freund, E., *op. cit.*, p. 375.

[25] *Ibid.*, p. 497.

[26] 19 states (Ariz., Calif., Colo., Conn., Fla., Ga., Ida., Ill., Me., Minn., Miss., Mo., Mont., Nev., N. Y., N. D., S. D., Wash., Wyo.). *Index Digest of State Constitutions*, New York, 1915.

[27] 98 U. S. 145 (1878).

[28] People v. Cole, 163 App. Div. 292, New York, July 1914. The healer was held to have violated the law.

[29] Ferreter v. Tyler, 48 Vt. 444.

[30] Freund, E., *op. cit.*, p. 499. Cooley, T. M., *op. cit.*, p. 591.

[31] Specht v. Com., 8 Pa. St. 312.

[32] Freund, E., *op. cit.*, p. 501. Cooley, T. M., *op. cit.*, p. 589.

[33] Donahue v. Richards, 38 Me. 379.

[34] Freund, E., *op. cit.*, p. 492.

[35] Evans v. Selma Union High School District, 222 Pac. 801 (Calif. 1924): That purchase of copies of King James Version for School Library is not a violation of code which excludes all books of partisan or denominational character.

[36] *American Year Book* for 1915, p. 723.

CHAPTER XVI

FREEDOM OF SPEECH AND PRESS

The Relation of Religious Liberty to Freedom of Speech and Press

Religious liberty guarantees freedom in doctrine and worship. Religion tends the hidden spiritual fire, but proves its genuineness by dominating the whole life of the believer. The spark becomes a consuming passion that moves mightily to action. Yet we often say that the sphere of religion is aspiration, intention, thought, and emotion, and the sphere of the state is overt action. In reality these two spheres overlap, and historically the state coerced religious thought and expression as it standardized political thought and action. Gradually the state learned that the best fighters, like Cromwell's Ironsides, could not be cowed by the commands of man in matters of religion, and that the best citizens were those whose religion was based on personal conviction. The state reluctantly surrendered a degree of religious liberty that it might strengthen its power over conduct, but it determined the limits of the liberty granted. We will not say that here were two sovereignties which divided the field between them, but that the state, as it became more and more democratic by the growing independence of its citizens, increasingly became reconciled to the independent expression of thought on religious and moral questions and learned to profit by the free exchange of ideas on the relations of church and state. When the Puritan revival had mightily stirred the English people, the great majority of the Puritans still held to coercion in religion, but the small minority of dissidents, controlling the New Model army, imposed religious toleration on the nation. They were the Puritans of the Puritans and carried the reform doctrine to its logical conclusion.

Their work was temporarily overturned in the Restoration, but, says Green,[1] "The history of English progress since the Restoration, on its moral and spiritual sides, has been the history of Puritanism." In the colonies the ecclesiastical organization of these dissident bodies became the model of political organization. American democracy is the outgrowth of these tiny Puritan democracies. In some of them religious liberty was developed at a very early period, as we have seen.

The struggle for freedom of expression, both in England and the colonies, was necessarily of a politico-religious nature, but when religious liberty or a large measure of toleration had been attained, the new spirit of independence, evoked by the Puritans, began to vent itself in purely political struggles with the insistent demand for freedom of speech and press. The Wilkes [2] case in England, which gave a name to a Pennsylvania town, and the Zenger [3] case in New York were outstanding examples. Against autocratic government brave men, not always discreet and well-balanced, began to speak out and dare the vengeance of office-holding cliques, corrupt governors, and a wilful king. So when the American Revolution began to formulate its bills of rights, next after religious liberty came freedom of speech and press, conceived of as differing from the former as freedom of political expression differs from freedom of religious expression.

Loyalty to God demands freedom in religion, and loyalty to the state, when democracy is given some recognition in the government, equally demands freedom in discussion. The lives and property of the people are at stake. They demand the means of information, the right to hear argument and counter-argument, the liberty to think for themselves and create public opinion, and finally the power to bring pressure to bear upon their representatives and to petition government for the redress of grievances. When rulers sneer at the ignorant rabble and refuse to be moved by popular clamor, the people in impotent fury break out in sedition and riot, but when representatives take their constituents into their confidence and keep their ears to the ground, the people acquire a steadiness and persistence in following high aims that often rise to heroism. The political education of such a people is largely through free speech and press.

In normal times discussion must be free. But there are times of crisis — may they be hereafter most infrequent! — when discussion must cease and every power of the nation must be mobilized in a supreme effort to save the state. There is " a time to keep silence, and a time to speak; . . . a time of war, and a time of peace." [4] Though international good will and the hatred of war may become so strong as to make war almost impossible, yet, if it comes, the whole body of citizens rises to meet the common danger, animated by the single will to conquer. Even then theoretically there is still the constitutional right of free speech and press, but it is limited to discussion of minor issues and new developments, not inconsistent with the submission of the major issues to the arbitrament of arms.

I. Freedom of Speech and Press in Time of Peace

1. *Definition of the Right*

The great American jurist Cooley defines the right as follows: " The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals." [5] This definition, though comprehensive, omits what is, from the point of view of history, the very essence of the guaranty, and it omits a very important exception from its operation, namely, incitement of crime, and, specifically, of the crime of sedition. Therefore the older definition of Blackstone may be preferred: "The liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."[6]

2. *Federal and State Constitutional Provisions*

The guaranty of free speech and free press with its related rights is found in the First Amendment of the federal constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Article I, Section 7, of the present constitution of Pennsylvania provides as follows: "The printing press shall be free to every person who may undertake to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact of such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." This section is derived in substance from the state constitution of 1790. The original provision in the constitution of 1776 was strikingly similar to the provision on freedom of speech and press, quoted above from the federal constitution. The constitutions of 42 states guarantee freedom of speech, nearly all of them linking with the right the responsibility for its abuse. The constitutions of all the states guarantee freedom of the press, and the reservation of responsibility for its abuse is, as with freedom of speech, very general.[7]

3. *The Unwritten Constitution; the Contrast Between American and European Principles with Reference to Personal Rights*

Besides written constitutions and statutes there is an unwritten constitution, the body of principles by which the written expressions of sovereign will are interpreted by the sovereign people and their agents. The English people cling to Germanic liberties; the peoples of continental Europe early came under the domination of Roman imperial ideals of order. Englishmen claim a large degree of independence; continental peoples have become habituated to a large degree of governmental control. The favorite measures of the English government are therefore remedial, of continental governments, preventive. The English punish the abuse of liberty; continentals seek to prevent the possibility of abuse. If a given expression of will, either customary or statutory, is out of harmony with the legal system as a whole, a process of erosion is set up by the courts, followed by amendment or repeal, if the harmony of the system cannot otherwise be attained. But the law of every country must change, and the two great systems of law are constantly borrowing from each other and are approaching an ultimate unification.

The American legal system is derived from England, where the rights of individuals are more consistently and thoroughly protected than in the United States. We have written our inherited English rights on parchment. The English themselves have written theirs in their habits and political philosophy, on their bones and in their very souls. Yet in America where the two peoples, the original British stock and immigrants from the continent, are coalescing, the excellencies of both bodies of law should be combined in anticipation of the approaching unification.

4. *The System of Licensing and Preventive Control Contrasted with the System Based on Individual Responsibility*

The repression and coercion of thought upon religion and politics which characterized the Tudor and Stuart periods were not in accord with English love of liberty and with the general character of English law. The great soldier of the Commonwealth had championed religious liberty, but, inconsistently enough, his censorship of the press was rigorous beyond precedent. The restored Stuarts continued the same policy and their ministers hoped utterly to suppress news-letters, as newspapers were called at first. The Revolution of 1688 brought a flood of pamphlet literature. Finally in 1695 Parliament definitely refused to renew the Licensing Act.[8] The House of Commons had no conception that it was establishing a fundamental right, a distinguishing principle of English law. The Commons drew up a long paper enumerating the abuses and the petty grievances connected with the administration of the Licensing Act, and on these grounds they abolished the censorship. They did, however, establish a great principle and brought the law upon the expression of opinion into harmony with the common law and statute law of England. There had been no censorship of the spoken word, and now there was no longer a censorship of the written word, but there remained responsibility for the abuse of the right of free speech and press. As Lord Mansfield said, "The liberty of the press consists in printing without any previous license, subject to the consequences of law."[9]

Whereas since 1700 the doctrine in England has been that the government has nothing to do with the guidance of opinion, and there has been almost no press law or interference with the freedom of writers, in France, on the other hand, literature has been considered for centuries as the particular concern of the state. It has been a governmental function to guide opinion. Before the opening of the States-General in 1789 there scarcely existed in France a daily or weekly press. Suddenly there was a multiplication of newspapers, representing every shade of thought. The Declaration of the Rights of Man proclaimed the right of every citizen to publish his opinions, but the Convention in 1793 passed a law against seditious works, which silenced all free expression of opinion. Censorship existed under the directory, under the restored Bourbons, under the second empire, and freedom of the press only became real in the third republic. Still there is an elaborate press law. The influence of France was determinative upon the continent, first for control and recently for relaxation from restraint.[10]

5. *English Law on Responsibility for Abuse*

When Curtis was defending President Johnson in impeachment proceedings before the Senate he said this of English common law: " Under the common law no man was ever punished criminally for spoken words." [11] The English were disposed to ignore the public danger of spoken words except in extreme cases when words were seditious, blasphemous, or obscene. The term for the abuse of the right of free speech was slander, and that was regarded not as a crime but a civil wrong, the defamation of persons. The proof of the truth of the words, claimed to be slanderous, was their sufficient defense. The written or printed word involved the possibility of grave public danger as well as private wrong. The term for the abuse of the right of free press was libel, and that might be a crime or private wrong. Criminal libel might be seditious, blasphemous, obscene, or defamatory. Truth was no defense, for disparaging statements, quite true in fact, might lead more certainly to a breach of the peace than false statements. So the adage was, The greater the truth the greater the libel. In civil cases for damages the proof of truth was a sufficient defense, for no man is entitled to be thought of more highly than his true character deserves.[12]

In the eighteenth century judges in cases of seditious libel and defamatory libel were more appreciative of the resentment of men in high station who were sharply criticized in the public press, than they were of the necessity of unrestricted discussion of public issues and public characters. There was a strong tendency to distinguish the functions of judges and jurors, and in libel cases for the judges to say that it was their exclusive function to decide whether a particular article in a newspaper was libellous or not, leaving nothing for the jury to decide, as the fact of publication was usually admitted. That was the prevailing view of the judges, but Mr. Justice Willes dissented, holding that it was the constitutional right of the jurors "to examine the innocence or criminality of the writing, and though they found the publication and innuendoes were proved, they might still give a general verdict of acquittal without being obliged to give their reasons."[13] Many unpopular convictions led to the passage of Fox's Libel Act[14] in 1792 that made this view of the jury's rightful power the law of England. A result of the passage of this law was that the prosecution was obliged to convince both the judges and the jury that the defendant was guilty.[15] Even then it was possible that judges and juries in times of tension would find guilt where the same men in a calmer time would have found only innocence. The law in England has gone right on developing in the effort to find the golden mean between the extremes of unlimited right of free speech and free press, and the abuse of the right. This has been done partly by judge-made law and partly by statute law, particularly in the protection of fair comment, and the development of privileged communications.

6. *The Development of American Law*

The English common law on free speech and press, outlined in the first paragraph of the preceding section, was also the common law of the American states in 1776, as modified by state constitutions, statutes, and judicial decisions. The first constitution of New York omitted the guaranty of free speech and press, but the people had the guaranty in the common law. The first constitution of Pennsylvania stated the guaranty simply without reference to responsibility for abuse, but the responsibility was implicit, supplied by the common law. So too the guaranty in the First Amendment of the federal constitution was to be interpreted by the aid of the common law. There was to be no previous restraint on speech and press but there was responsibility for the abuse of the liberty.

But the guaranty, even though it were never formally amended, should not be interpreted as fossilizing the common law of 1776 on free speech and press.[16] No, it is a creedal article of political faith, a fructifying principle that admits of change and development in its application. Change has been going on by legislation and judicial decision, but the growth has been most apparent in formal changes in constitutions. We have seen that the English adopted Fox's Libel Act in 1792, but Pennsylvania anticipated this action in its constitution of 1790. Many states followed in extending the power of the jury. In 1804 Alexander Hamilton argued that in all trials for libel, both civil and criminal, truth when published with good motives and for justifiable ends, should be a sufficient defense.[17] This was a proposed modification of the common law rule, and New York and many other states amended their constitutions accordingly. The doctrine of fair comment is often applied by judges or enacted into law. It means that, "When a person has done or published anything which may fairly be said to invite public attention, everyone has a right to make fair and proper comment thereon, and as long as he keeps within that limit what he publishes is not libel." This right "does not extend, however, to the private character or life of those who have invited public attention to certain of their acts or works." [18] The doctrine of privileged communications is also employed by judges whether or not it is guaranteed by constitutions and statutes. Absolutely privileged communications are defamatory statements made in legislative or judicial proceedings, but many American courts do not follow this English rule fully, but hold that defamatory statements of parties, counsel, and witnesses must be made in good faith and without actual malice. There is a popular belief that the criticism of public officials is absolutely privileged, but the Pennsylvania requirement that such publications shall not be maliciously or negligently made appears to reflect the more general law. Conditionally privileged communications are defamatory statements of third parties, on whom is the burden to prove that their statements are made in good faith and without malice. These third parties must stand in confidential relations to the parties receiving the statements. The relations of guardians to their wards are typical of this qualified protection.[19]

This steady growth of the law must not suggest that there has been no element of tragedy in the history. When the republic was on the brink of war with France, and Jeffersonian editors were outrageously attacking President Adams, Congress passed in 1798 a law against seditious libel, punishing false, scandalous, and malicious writings against the government of the United States.[20] The law embodied some of the latest procedural improvements, but it permitted Federalist judges to punish Jeffersonian editors for criticizing a Federalist president. The people resented this curb upon the expression of opinion on public affairs. The law expired by its own terms, but the party that summoned its aid died with it. Yet somewhat over a century later a president of Jefferson's own party signed a similar act against sedition. In 1805 in Pennsylvania there was a prosecution for seditious libel under the common law against a person who had written that, "Democracy is scarcely tolerable at any period."[21] The court charged the jury that they must decide whether or not the defendant was a seditious person with criminal intention, and the jury rendered a verdict of not guilty. That case was for many decades described as the last case on seditious libel. But in recent years many laws of a similar nature have been passed by state legislatures. Critics like Professor Chafee[22] would have such laws declared in violation of organic law, either state or federal, but even if they are war measures, remaining on statute books in time of peace, and are examples of an ineffective method of curing social unrest, the proper method of annulling them in a democracy is by repeal, legislative or popular, and not by judicial exercise of a doubtful power.

II. Freedom of Speech and Press in Time of War

1. *The Special Danger of Unregulated Expression of Opinion in Time of War*

War is no longer a normal relation of civilized states to each other, nor is it a frequently occurring malady, but a frightful cataclysm, made more terrible than ever before by science and invention. It must be banned from the family of nations, but if a nation is forced into war to save civilization and its own existence, or believes itself so forced, after the declaration of war only one opinion, one will, can be tolerated. A loyal citizen may have entertained a warm attachment to the fatherland from which he or his ancestors emigrated, and he may have considered himself a missionary of a superior culture to a new country; but now, if the fatherland is an enemy country, he must summon every energy to its defeat, and the wish for its military success must not escape from his lips. Nay, it is his duty to repress thoughts that were natural and permissible before the fateful declaration. War means the mobilization of the full power of the state, physical and moral. Every man, woman, and child must contribute to the success of the war aims of the nation. The national government attempts to mobilize opinion, but states, criticizing the leniency of such efforts, pass acts more coercive in character,[23] and the people themselves, impatient of governmental action, spontaneously organizing, put irresistible pressure upon suspected persons to force their contributions for war loans and the increase of production.

2. *Federal Legislation to Meet the Danger*

Even before the war, when we were being rapidly drawn into the world struggle, the president asked for authority from Congress to impose a so-called censorship on newspapers — of course not the censorship known to English law before 1695. The authority was not given. After the declaration of war in 1917 the president renewed the request. Each house at some stage adopted a provision for censorship, that is, a prohibition on the publication, wilful and without proper authority, of information which might be useful to the enemy. But the Espionage Act as finally passed abandoned even a mild form of censorship. Among provisions on many subjects it did forbid disturbance of foreign relations by false statements, and it gave the Postmaster General authority to exclude from the mails all matter deemed seditious.[24]

In the absence of authority to establish even the so-called censorship the president proceeded to establish a voluntary censorship of the press. He appointed a Committee on Public Information under the executive control of George Creel, who issued to the press a carefully prepared statement setting forth the character of the information to which the government desired publicity should not be given, and the rules to be observed by the press in giving information of a military nature or in commenting on such news. Mr. Creel admitted frankly that these regulations were not legally binding, but it was hoped that the press would voluntarily observe them.[25]

Following the precedent established in the Spanish-American War Mr. Wilson assumed control over all means of radio communication, and telegraph, telephone, and cable communication with foreign countries. Congress by passage of the Trading with the Enemy Act conferred on the president power to censor all communications of every sort between the United States and any foreign country. Under that act a Censorship Board was created to enforce its provisions.

The Espionage Act of June 15, 1917, proved not drastic enough in view of enemy propaganda in this country. Therefore an amendment was passed which was approved May 16, 1918. This act prohibited utterances or publications of a treasonable or seditious character, or of a nature calculated to give aid and comfort to the enemy, or to embarrass the government in its war activities. This espionage act of 1918 is often called the Sedition Act.[26]

3. *Judicial Interpretation of Legislative Curbs Upon Expression of Opinion*

The case of Masses Publishing Co. v. Patten [27] involved the petition for an injunction against the postmaster at New York for excluding from the mails an issue of the *Masses*, a revolutionary journal which contained articles and cartoons attacking the war. The postmaster claimed that the number tended to encourage the enemies of the United States and hamper the government in the conduct of the war. Judge Hand held that the number stopped short of urging upon others that it was their duty or interest to resist the law. Professor Chafee commended this decision as conforming to his own definite test of direct incitement to crime, leading to success or dangerously approaching success. The circuit court of appeals, however, reversed the decision, holding the publication punishable "if the natural and reasonable effect of what is said is to encourage resistance to law, and the words are used to persuade to resistance." In the view of the attorney-general the interpretation of Judge Hand "took the teeth" out of the act. The older interpretation by "dangerous tendency" proved more effective in time of war.

The case of Schenck v. United States [28] involved not the interpretation but the constitutionality of this war-time legislation. Schenck, general secretary of the Socialist party with headquarters at 1326 Arch St., Philadelphia, was charged with others with conspiring to violate the act by causing or attempting to cause insubordination in the military forces of the United States and to obstruct the recruiting and enlistment service of the United States. The means were the printing, distribution, and transmission through the mails of leaflets, calling upon all persons, subject to the draft, to assert their rights and oppose the draft by refusal to obey the commands of the Conscription Act. Schenck claimed that he was protected by the First Amendment, establishing freedom of speech and press. But Mr. Justice Holmes, speaking for the court, decided as follows: "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

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[1] Green, J. R., *History of the English People,* Vol. III, p. 308.

[2] *Ibid.,* Vol. IV, pp. 215 ff. Chafee, Z., *Freedom of Speech,* pp. 294 ff.

[3] Hamilton, Andrew, Speech at trial in N. Y., Aug. 4, 1735; *World's Best Orations,* Brewer Ed., Vol. VI, pp. 2372 ff.

[4] *Eccl.* 2:7, 8.

[5] Cooley, T. M., *Constitutional Limitations,* p. 521.

[6] Cooley's *Blackstone,* Book IV, p. 151.

[7] New York Commission of 1915, *Digest of State Constitutions,* pp. 700 ff.

[8] Temperley, H. W. V., in *Cambridge Modern History,* Vol. V, p. 271.

[9] Chafee, Z., *op. cit.,* p. 8.

[10] Dicey, A. V., *Law of the Constitution,* pp. 261 ff.

[11] Curtis, B. R., *World's Best Orations,* Brewer Ed., Vol. IV, p. 1567.

[12] Stephen's *Commentaries,* Vol. III, pp. 398 ff. Dicey, A. V., *op. cit.,* pp. 234 ff.

[13] Burdick, F. M., "Libel and Slander" in Johnson's *Cyclopedia,* Vol. V, p. 215.

[14] Freund, E., *Police Power,* p. 507.

[15] Schofield, H., *Essays on Constitutional Law and Equity,* Vol. II, p. 517.

[16] *Ibid.,* Vol. II, pp. 510 ff. Chafee, Z., *op. cit.,* p. 20. Hughes, C. E., *The Supreme Court,* p. 164.

[17] Schofield, H., *op. cit.,* Vol. II, pp. 538 ff.

[18] Burdick, F. M., *op. cit.,* Vol. V, p. 216.

[19] *Ibid.,* Vol. V, p. 216.

[20] Johnston, A., "Alien and Sedition Law" in Lalor's *Cyclopedia*, Vol. I, pp. 56 ff.

[21] Freund, E., *op. cit.*, p. 508.

[22] Chafee, Z., *op. cit.*, pp. 110 ff. Chafee, Z., *The Inquiring Mind*, pp. 49 ff.

[23] *Ibid.*, p. 41.

[24] *American Year Book* for 1917, pp. 12, 13, 515, 516.

[25] *Ibid.*, for 1918, pp. 42 ff.

[26] *Ibid.*, pp. 10 ff.

[27] Chafee, Z., *Freedom of Speech*, pp. 46 ff. 244 Fed. 535 (1917) and 245 Fed. 102 (1917).

[28] Chafee, Z., *op. cit.*, p. 88. 249 U. S. 47 (1919).

CHAPTER XVII

THE RIGHTS OF ASSEMBLY, ASSOCIATION, AND PETITION

Review of Freedom of Speech and Press, and Relation to Rights of Assembly, Association, and Petition

The freedom of speech and press is essential to a self-governed people if the multiple sovereign is to act intelligently and wisely. One of the evils of war is that laws enacted to curb all thought and effort, not contributing to the early and victorious termination of the war, are retained on the statute books and enforced after the war, which made them necessary, has been won. Another is that the people carry into the peace time the intolerance, prejudice, and impatience with minority opinion, which were part of the war psychology. If legislatures fail to repeal laws which unduly curb expression of opinion in time of peace, may courts nullify such laws by stretch of the indefinite power assumed by them under so-called due process of law? In Gilbert v. Minnesota [1] the United States Supreme Court sustained a law of Minnesota of this character, but Mr. Justice Brandeis in a dissenting opinion suggested that the right of free speech was part of the liberty protected by the due process clause of the 14th Amendment. Subsequent decisions appear to sustain his point. Encroachments on legislatures and Congress have their origin sometimes in the dictum of a single eminent judge in a dissenting opinion. In a democracy public opinion should be brought back to sanity, and legislatures, reflecting such opinion, should amend the laws accordingly.

Academic liberty is essential in a democracy, if the multiple sovereign is to have available the advice of trained investigators and impartial critics of our institutions. Instruction in colleges and universities should be unshackled, and the thought and experience of the world should be brought to the acquaintance of the students, who should be encouraged to investigate and think for themselves. The founders of our republic were for the most part young men, widely read in the political philosophy of their day and acquainted with political history. Men similarly trained are needed to carry on their work.[2] The teachers in primary and secondary schools may not be expected to possess quite the same balance and breadth as we assume to be the qualities of the teachers of advanced subjects, but their work is of even greater importance. They should be patriotic, teaching the children to love their country because it is their country, without intruding their personal politics. They should fan the flame of religion as an aid to the state, without propagating their private religious faith. With these limitations a very considerable degree of academic freedom must be given teachers generally that they may find zest in their work and individual expression. But suppose a great city elects a buffoon to its mayoralty and he proceeds to impose his peculiar brand of Americanism upon the school system,[3] or suppose a legislature of well-meaning men, dominated by obscurantists, passes a law on the teaching of science, repudiated by the learned world,[4] may the teaching fraternity appeal to the courts to sustain its academic freedom as guaranteed in the right of free speech and free press? The view of the author is that the state may impose whatever conditions it likes on its own employees, and so may the governing authorities of private institutions. Public opinion must be liberalized, and then the legislatures and governing authorities will reflect such opinion in their determinations, as in fact they do in most states.[5]

The importance of free speech and press is due to its educational value, assisting the citizens to think correctly and act wisely. In decisions on substantial interests they are accustomed to seek expert advice. But they resent any effort of their entertainers to instruct them or uplift their thought in their hours of relaxation. The more *risqué* the story and the more salacious the novel, the more amused they are. Their knowledge of books is too often limited to fiction, the best sellers, made so, perhaps, by the advertised unfitness of the books for publication. In this prostitution of one of the greatest arts there is need of censorship, no less than in the case of moving pictures and theatrical exhibitions, where the necessity was also compelling. But censorship by governmental agents appears to be denied by the constitutional guaranty in the case of spoken or printed words when not made a part of an exhibition, yet purveyors of obscenity may be punished after publication. This alone is not effective. The Puritan tradition survives in Boston though the old stock is in woful minority. The Watch and Ward Society, an organization for the suppression of vice, was accustomed to give notice to the local booksellers' association of its opinion that certain books were indecent, whereupon such books were withdrawn from sale. The dealers were saved the danger of prosecution and punishment for the sale of books which a jury might find indecent. A Baltimore publisher invited a legal contest in Boston and finally sued the society in a federal court. The court decided that, "The defendants have the right of every citizen to come to the courts with complaints of crime; but they have no right to impose their opinion on the book and magazine trade by threats of prosecution if their views are not accepted."[6] The practice of the society and the booksellers' association was in the nature of a voluntary censorship, of distinct advantage to the dealers and the public, a censorship from which the parties could withdraw, for the dealers had the legal right to invite prosecution. This decision in aid of commercialized obscenity is to be deplored.[7]

The relation of the right of free speech and press to the rights of assembly, association, and petition, is so close that the discussion of one involves the discussion of the others. The knights of the shires and the burgesses, as well as the representatives of the lower clergy, were summoned to the king's court to unite with the lords, spiritual and lay, in making grants to the king's service. The custom was to withhold grants to the king till he had given redress of grievances. It was therefore necessary for the lower orders to meet privately to formulate their petitions and decide upon their grants. There was extreme danger if their speeches in these meetings were reported outside. When this private meeting had developed into the House of Commons these practices hardened into privileges.[8] Blackstone declared that the votes of a member whose " conduct is subject to the future censure of his constituents . . . should be openly submitted to their inspection." [9] Yet there continued to be great fear of misrepresentation in the newspaper reports of debates, and the house refused to give leave to print. As late as 1771 the Commons ordered the arrest of a printer of their debates, and when the mayor and aldermen of London protected him they ordered the seizure of the mayor and two aldermen and committed them to the Tower. After this incident the house yielded to strong popular feeling, but even to this day the debates are published on sufferance and theoretically are subject to the right of privacy in debate.[10]

Our fathers were no doubt influenced by these occurrences and therefore in Pennsylvania made constitutional provisions not only for the public meetings [11] of the General Assembly but for the publication of its proceedings.[12] Pennsylvania itself, as recently as 1758, had given an amusing illustration of the sensitiveness of legislators to printed criticism. The assembly had requested the governor to remove one of the judges. The governor thereupon undertook to investigate the case and received a printed defense, signed by the judge but written by William Smith, first provost of the University of Pennsylvania. The assembly pronounced both the judge and the provost guilty of contempt and sentenced them to imprisonment till they should give satisfaction to the assembly. Appeal was taken to the king-in-council who decided that the assembly had assumed unlawful powers.[13] If the rights of meeting and free speech were essential to the representatives of the people, so they were to the people themselves when they desired to exercise the right of petition for redress of grievances, for they must meet and debate on the content of their petition. In England the right of petition alone was guaranteed in their bills of rights, and the related rights were protected by judicial decision alone, but in America all these rights, except that of association, eventually were enshrined in written constitutions.

I. THE RIGHT OF ASSEMBLY

1. *The Guaranty in Federal and State Constitutions*

The First Amendment of the federal constitution provides that, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Article I, Section 20, of the present constitution of Pennsylvania provides that, "The citizens have a right in a peaceable manner to assemble together for their common good and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance." This provision may be traced back in identical language to the constitution of 1790 and in similar language to the constitution of 1776. With a change of a single word, and that not material, the language of this section may be found in six other constitutions, and language substantially the same may be found in nearly all the remaining constitutions. Maryland has only the provision for right of petition, of the rights treated in this chapter, but the statement of that right implies the right of assembly.[14]

2. *The Genesis of the Right in English Law*

We have seen that in England the judges from the general principle of the liberty of the subject developed the doctrine of the liberty of the press. They were left free to do this when Parliament refused to renew the Licensing Act. In quite the same way the judges derived this supplemental right of freedom of assembly, in the absence of any statute limiting in this respect the liberty of the subject. Just as in England there was no general press law, so there was no general law for the regulation of public meetings.

Let us try to illustrate this English principle, as expounded by Professor Dicey,[15] which is quite the opposite of the German principle on the right of assembly. Two Englishmen have the right to meet in the open air or elsewhere so long as they do not commit a trespass and their purpose is lawful. What two may do a thousand may do, and so you have in England the right of public meeting. Two Englishmen may walk down High Street or go to the common. What two may do a thousand may do. So you have in England the right of public processions on the streets and public meetings in public parks. The assembled subjects may advocate the abolishment of the House of Lords or the passage of any law they favor. So you have in England the right of meeting for political purposes. It is a picture of complete liberty with no word of censorship, license, or permit.

Yet in English law, the unwritten law enforced by the courts, if the conduct of those participating in a public meeting is such as to incite a breach of the peace the meeting becomes unlawful and may be dispersed. Now the Salvation Army in the early days of that organization advertised a proposed meeting at Weston, and the Skeleton Army, a trumped-up, mocking organization, announced that they would break up the meeting. The local magistrates, fearing disorder, posted a notice forbidding the meeting. Nevertheless the Salvationists assembled and were met by the police. One of the members declined to obey and was arrested, making possible a test case. He was convicted by a lower court. The case was taken on appeal to the Queen's Bench Division of the High Court. The decision was as follows: " What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." Thus in the famous English case of Beatty v. Gillbanks[16] the right of public meeting was definitely established. In the absence of an act of Parliament neither a local officer nor the Secretary of State for Home Affairs may issue an order that a meeting shall not be permitted if it is a lawful assembly otherwise.

3. *Contrast with the Law of Continental Europe*

Great is the contrast between English and continental law. The German law regulating the right of public meeting, as it stood before the Great War, was typical of the continental attitude. "Public assemblies for the discussion of political subjects," says Professor James, "must be announced 24 hours before to the local police authority . . . Public meetings in the open, as well as processions on public ways and places, must be approved by the police. . . . The police authorities may send not more than two agents to every . . . public meeting. . . . These agents may declare the assembly to be dissolved, with a statement of the reasons for such action."[17] Among the reasons at that time might be the discussion of resolutions containing incitement to crime, or if speakers unlawfully used any language but the German. Posen was then a part of Prussia. So a Polish member of the Reichstag might not speak to his Polish constituents in the only language which they understood.[18] Minors under 18 years were not permitted to attend political meetings. Heavy fines were imposed for violation of the law.[19]

4. *Development of the Law in America*

The American conception of the right of assembly follows in principle the English conception, but in practice it is often in accord with the German. In theory we stand for democratic liberty and against autocratic control.

(1) *As to Processions and Other Street Meetings*

"The constitutional right of assembly," says Freund, does not include the right to use for that purpose the streets and other places owned and controlled by state or municipality, but presupposes that those who assemble have a right to control the place where they meet. . . . Streets and public places are devoted to the use of the whole public for purpose of traffic, intercourse, and exercise, and the use must be enjoyed so that the rights of all are observed. An assembly, however, always interferes with the general public use, and a number of meetings at the same time may cause disorder and conflict. Under proper regulations this effect may perhaps be avoided, but plainly the use for this purpose cannot be claimed as a matter of common right." He goes on to show that generally the regulation of street traffic is delegated to municipalities, and then the courts may supervise the regulations on the basis of their reasonableness, but when the state legislature makes the regulations the United States Supreme Court recognizes the absolute authority of the legislature in its character of proprietor.

The result is peculiar. In England the right had not even the sanctity of a statute. In America it is exalted to a place in the constitution. Yet the transplanting of this very substantial English right has caused it to wither to an airy nothing. It is quite clear to the author that a thousand men have the same right to dress in uniform and march in compact companies, as any other thousand men have to throng the streets for an airing. One is as much the public use of the streets as the other. No doubt as congestion increases regulation must be carried to an undreamed-of extent, but ought not regulations always to be reasonable and equitable, never discriminating against certain classes of traffic unjustly? Great thundering trucks may properly be barred from destroying the light pavement of residential streets. Business traffic may be barred from boulevards, as in Chicago. Parades may be routed to the mutual convenience of the participants and other forms of traffic. But there ought not to be the arbitrary power to refuse permits for parades, otherwise lawful, because the administrative officers do not approve of the religious faith, or political party, or economic program of the marchers. The Salvation Army was subjected formerly to grossly unjust regulations, especially in Massachusetts and other eastern states, while regulations, upheld in these states, were declared unreasonable and void in western states.[20] In later years the hostility of petty tyrants has been turned to organizations of alien elements, not yet adjusted to life in the new world. When they are treated unfeelingly, even brutally, their loyalty to America is not gained by such mistaken methods.[21]

(2) *As to Meetings in Public Parks*

One of the sights of London is Hyde Park and the provision made there for the ventilation of fifty-seven varieties of opinion. It proves to be an amusing entertainment and a safety valve where heated social boilers blow off steam. Of course strange ideas are set forth, but the power of truth in the open is far more effective to meet them, than it would be if there were a ban on the free expression of opinion.[22]

Born of the Civil War was a repressive ordinance, passed by the city council of Boston, which provided that there should be no meetings on public grounds unless permission had been previously granted. For a long series of years permits were easily procured. Beginning in 1883 permits were refused the Young Men's Christian Association. It was determined to test the validity of this action. Dr. A. J. Gordon, a saintly man, universally admired, addressed a meeting on Boston Common, and was arrested and fined. Free speech and right of assembly became an issue, and the great lights of New England came forward to do battle for freedom. Before public opinion was aroused to the point of winning a moral victory one earnest preacher, Davis by name, "was imprisoned for more than a year in close confinement in Murderers' Row, Charlestown Prison, allowed no exercise, insulted by turnkeys, and given insufficient food until scurvy set in." [23] When his case was taken up to the United States Supreme Court the ordinance and the unjust exercise of discretion under it were sustained by that court of last resort, no, not of last resort, for ultimately public opinion must decide.[24]

Though this dangerous power remained in the hands of the local authorities, it appears that permits were issued for many years after the Davis decision as a matter of course. "Before the war," says Professor Chafee, "the police were very tolerant." [25] An entirely different policy was adopted in August, 1927. At this time the objection to the speakers was that they had unfavorably discussed the courts, but says Chafee, "In a democracy no elective and no appointive official should be kept beyond the reach of public opinion." Years before 1927 Mr. Justice Brewer of the United States Supreme Court, an able jurist, said: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism." [26] But it matters not whether the subject discussed is religion, politics, or economics, the English right of assembly gives full liberty to speak in public parks and streets, and the American right of assembly in Boston and Philadelphia sometimes means that where the great Whitefield spoke to thirty thousand hearers no man may speak publicly at all.

(3) *As to Meetings on Private Property*

It is supposed that the English doctrine of free assembly has full application to meetings on private property when the owners of the property have given their permission. The spirit of unchecked discretion, like the smallpox, cannot easily be quarantined. Says Professor Chafee: "No statute declares that the Mayor of Boston shall have power to forbid public meetings in advance because of their purpose, or to punish the owner of a hall for permitting a meeting against the Mayor's will. Yet in actual practice . . . the Mayor has often exercised such a power by threatening halls where forbidden meetings are held with proceedings for structural defects." [27]

Though Boston, our cradle of liberty, is a strange complex of enlightenment and medievalism, the Interchurch Steel Report revealed that within the last decade a similar situation obtained in Pennsylvania. Says Chafee again: "Satisfactory public opinion in a crisis is impossible unless both sides can present their contention in meetings and through the press. The right of assembly was virtually denied to the unionists in western Pennsylvania before and during the strike. In some cities meetings were unlawful unless a permit was given, and it was often arbitrarily refused by the authorities."[28] These sore spots are relatively local and are not typical of the country as a whole. We are fast approaching a new period of mutual understanding and adjustment. A new appreciation of the right of assembly and enforcement of the right would hasten the solution heartily desired by all good citizens.[29]

(4) *As to Unlawful Assemblies*

The several situations which may make an assembly unlawful are briefly stated under the following heads:

(a) To commit a breach of the peace in assembling;

(b) To assemble with intent to commit a breach of the peace;

(c) To commit a breach of the peace after assembling;

(d) To assemble for a lawful purpose but in such a manner as to give rise to reasonable fear of a breach of the peace.

The statement under three of these heads appears to be well founded. If men who propose to hold a meeting make a forcible entry upon private property without legal authority to make the entry, the meeting is clearly an unlawful assembly. If they meet to hatch out a conspiracy for the commission of crime, or if they meet for a lawful purpose but come to disagreement and enforce their arguments by blows, in either case it is an unlawful assembly. But the Salvationists had the legal right to meet at Weston in spite of the threats of the Skeleton Army and in spite of the order of the local authorities not to meet. Yet if the Skeleton Army attacked the Salvationists and the authorities were unable to expel the disturbers and restore order, the authorities then would have the power to declare the assembly dissolved, and if the Salvationists persisted in continuing the meeting they too would have been guilty of holding an unlawful assembly.[30] That appears to be the English rule, but American local authorities frequently assume the power to forbid the meeting in advance on the ground of the disturbed condition of society, as if it were a time of war or insurrection, and so they destroy the right entirely in a time of peace. This is a real abuse of power.[31]

II. The Right of Association

The right of association must be distinguished from the right of assembly, as a permanent organization is distinguished from a single meeting. But if the persons meeting have permanent interests and hold repeated meetings to further those interests, they naturally form a guild or society. The right of assembly was developed in England out of the general liberty of the subjects, and the right of association may be regarded as comprehended under the right of assembly. As a matter of history the English from the beginning organized guilds and societies for fraternal, charitable, religious, and economic purposes. Yet outside of the established agencies of self-government they did not till a late period form political parties, and even then parties remained unknown to the law. Secret organizations, aimed to overturn the government, came under the law against conspiracies. Political associations, therefore, could not be permitted under the Tudor and Stuart régimes. The right of petition was granted in the Bill of Rights in 1689. The right of free press was established in 1695. The right of assembly was developed by the courts. In the period of the French Revolution the first limitation on the right of association was the passage of the Unlawful Oaths Act of 1797, aimed against secret seditious associations. The amended laws against illegal societies are still in force.[32] Protection from the possibility of being held to be illegal societies, and other privileges are granted to registered societies, of which there are many forms. Trade unions are registered as friendly societies.[33] The law is now liberally interpreted in favor of the right of association.[34]

While the right of association had a somewhat retarded development in England, it was inherent in the general liberty of the subject. On the continent the general reception of the Roman law was a positive ban on the recognition of such a right. Corporations were, of course, the creatures of the state, but unincorporated societies were illegal unless especially permitted by law. Therefore the democratic movement on the continent has emphasized the right of association, and the right is regularly guaranteed in constitutions.

In the United States the right of association has been assumed to be a part of the right of assembly. De Tocqueville, writing of American institutions long before the Civil War, remarked upon the great danger of political associations to the governments of Europe, then organized on an aristocratic basis. Even in America he thought the right a dangerous expedient, though employed to meet a more formidable danger. He said: "The right of association was imported from England, and it has always existed in America; the exercise of this privilege is now incorporated with the manners and customs of the people. At the present time, the liberty of association has become a necessary guaranty against the tyranny of the majority." [35] Freund says: "There has been and is the most absolute protection of all political associations. This, however, does not necessarily mean lack of constitutional power of regulation." [36] He therefore holds that American legislatures can pass laws against secret political societies whose members bind themselves by oath implicitly to obey the orders of superiors. Indeed, such laws have been passed in recent years.[37] Furthermore, political parties have come under the regulatory powers of our legislatures, though they had long been unknown to the law here as in England.[38] The right of association has limitations but it is an important right.

III. The Right of Petition

When Charles II in 1679 had formed the permanent policy of ruling England without a parliament, petitions poured into London from all parts of the country begging the king to summon a parliament. Sometimes these petitions originated in noisy assemblies and were accompanied by marching supporters. The political party, just forming then, which inspired these petitions was called at the time Petitioners, but later Whigs, while the party which supported the king in ruling as he pleased and abhorred this tumultuous petitioning was called Abhorrers, but later Tories.[39] Ten years later the right was guaranteed in the Bill of Rights. We inherited this right, and its importance at one time before the Civil War assumed heroic proportions through the brave action of John Quincy Adams.[40] The right of petition has ever been considered a valued right, and is very generally found in American constitutions, but the interest in it is largely historical. Yet Francis Lieber, a man of great importance in the political thinking of this country, said this of the right: "It is . . . a sacred right, which in difficult times shows itself in its full magnitude, frequently serves as a safety-valve, if judiciously treated by the recipients, and may give to the representatives or other bodies the most valuable information." [41]

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[1] Chafee, Z., *The Inquiring Mind,* pp. 40 ff. 254 U. S. 325 (1920).

[2] Norton, T. J., *Losing Liberty Judicially,* p. 87 (*Contra*).

[3] *American Year Book* for 1927, p. 115.

[4] *American Year Book* for 1925, p. 87.

[5] Chafee, Z., *Freedom of Speech,* pp. 365 ff.

[6] American Mercury v. Chase, 13 F.(2d) 224 (1926). This decision is adversely criticized in 25 *Michigan Law Review* 74.

[7] Chafee, Z., *The Inquiring Mind,* pp. 135 ff.

[8] White, A. B., *Making of the English Constitution,* pp. 429 ff.

[9] Cooley's *Blackstone, Book* I, p. 131.

[10] Anson, W. S., *Law and Custom of the Constitution,* Fifth edition edited by M. L. Groyer, Vol. I, pp. 172 ff.

[11] Constitution of 1776, Frame of Government, Sec. 13.

[12] *Ibid.,* Sec. 14. Wilson, James, The Works of, Vol. II, p. 158.

[13] Bolles, A. S., *Pennsylvania,* Vol. I, pp. 357 ff.

[14] N. Y. Commission of 1915, *Digest of State Constitutions,* pp. 41 ff.

[15] Dicey, A. V., *Law of the Constitution,* pp. 266 ff.

[16] 9 Q. B. D. 308 at p. 314.

[17] James, H. G., *Principles of Prussian Administration,* pp. 234, 235.

[18] Gibbons, H. A., *The New Map of Europe,* p. 113. Kruger, F. K., *German Empire,* p. 41.

[19] Freund, E., *Police Power,* p. 516 (for French law). Dicey, A. V., *op. cit.,* pp. 266 ff. (for Belgian law).

[20] Freund, E., *op. cit.,* p. 516.

[21] Chafee, Z., *op. cit.,* pp. 156 ff.

[22] *Ibid.,* p. 155.

[23] Gordon, E. B., *Adoniram Judson Gordon,* pp. 117 ff.

[24] Davis v. Massachusetts, 167 U. S. 43 (1897).

[25] Chafee, Z., *op. cit.,* p. 151.

[26] *Ibid.,* p. 153.

[27] *Ibid.,* p. 143.

[28] *Ibid.,* p. 166.

[29] Stewart, E., *American Year Book* for 1927, pp. 478 ff.

[30] Dicey, A. V., *op. cit.,* p. 274.

[31] Chafee, Z., *op. cit.,* p. 166.

[32] Stephen's *Commentaries,* Vol. IV, pp. 166 ff.

[33] *Ibid.,* Vol. III, p. 120, note.

[34] Freund, E., *op. cit.,* pp. 516 ff.

[35] De Tocqueville, A., *Democracy in America,* Vol. I, p. 246.

[36] Freund, E., *op. cit.,* p. 519.

[37] The Walker Anti-Klan law of N. Y. upheld in People ex rel. Bryant v. Zimmerman by N. Y. Ct. of Ap., *American Year Book* for 1926, p. 110.

[38] Merriam, C. E., *Primary Elections.*

[39] Terry, B., *A History of England,* p. 773.

[40] Seward, W. H., *Life of John Quincy Adams,* pp. 269 ff.

[41] Lieber, F., *On Civil Liberty,* p. 121.

CHAPTER XVIII

SUBORDINATION OF THE MILITARY TO THE CIVIL POWER

I. The Right to Bear Arms

1. *Definition and Relation to Preceding Rights*

The rights of religious liberty, of free speech and free press, and of freedom of assembly are not to be taken literally as if there were no limitations, and the same is true of the several rights which collectively guarantee the subordination of the military to the civil power. This statement is strikingly true of the right to bear arms. There is no absolute liberty of doctrine; there is some degree of limitation on worship, and a sharp demarcation of liberty on the overt act originating in the religious motive, so we may define religious liberty as follows: A person has as large a degree of liberty in the expression of his religious beliefs and in the practice of religious teachings as is consistent with the rights of other persons and the welfare of society. One may not say or print what he likes without qualification. Therefore we may define freedom of speech and press as follows: A person has as large a degree of liberty in the expression of his opinions on matters of public interest or on what he conceives to be of interest to his hearers or readers as is consistent with the rights of other persons and the welfare of society. One may not hold a midnight meeting in his own apartment that disturbs the whole neighborhood. Every man's rights are limited by the rights of others. Therefore we define the rights of assembly and association as follows: A person has as large a degree of liberty to join with others in holding meetings or maintaining organizations as is consistent with the rights of other persons and the welfare of society in general. So again the right to bear arms does not mean an unqualified right to go armed in whatever manner wherever and whenever one pleases. We propose a tentative definition before constitutions are quoted and the law is developed in detail. It is as follows: First, a person has the right to arm himself for self-defense against illegal physical attack, subject to regulations for the protection of other persons and the welfare of society; secondly, as society in cases of insurrection or war must resort to military measures to enforce its will, it is the right of the citizens, as members of the political society, against the subversion of their free institutions, that the main military reliance shall be on the armed citizenry of the nation, and not on a professional military caste unresponsive to the popular will; and therefore, thirdly, it is the right of the citizens that they be trained, organized, and armed for the protection of the state and the nation.

2. *Constitutional Provisions*

The Second Amendment of the federal constitution is as follows: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." It may be wondered what the constitution of a state founded by the Society of Friends provides on the subject. Article I, Section 21, of the constitution of Pennsylvania is as follows: "The right of the citizens to bear arms in defense of themselves and the state shall not be questioned." Section 22: "No standing army shall, in time of peace, be kept up without the consent of the legislature, and the military shall in all cases and at all times be in strict subordination to the civil power." All the states except some thirteen have one or more provisions on the subject of arms' bearing. In a number of constitutions the right is guaranteed without statement of its purpose. In a larger number, 23 in fact, the purpose is defense of the state, explicitly or in words to that effect. In a still greater number the purpose authorized is defense of the citizen, his home, or his property. The number of constitutions that add to the right to bear arms the right to keep arms, or prefer the latter right to the former, are few, only about 16. Five states are careful to stipulate that carrying concealed weapons is not justified by the right to bear arms, and 11 other states have provisions against the same evil, carrying concealed weapons.[1] Those states which do not have the guaranty of the right to bear arms in their constitutions, no doubt have it in their statute or common law. It may be said with some confidence that the definition of the right to bear arms, offered in the preceding section, embodies the law and the unwritten constitution of Anglo-Saxon countries on the subject.

3. *Development of the Law and Unwritten Constitution*

The English had an instinctive fear of a standing army that might become an instrument of oppression in the hands of an irresponsible monarch. No sooner had they been liberated from the tyranny of James II than they demanded the reduction of the army that had liberated them. To this day the British Parliament renders a standing army practically impossible by passing the Mutiny Act, later called Army Act, only from session to session.[2] Francis Lieber said: "Ever since standing armies have been established, it has been necessary, in various ways, to prevent the army from becoming independent of the legislature. There is no liberty, for one who is bred in the Anglican school, where there is not a perfect submission of the army to the legislature of the people."[3] German though he was, he gave pointed illustrations from the then recent history of his own and other European countries of the futile effort to establish constitutional liberty in the face of standing armies, bound to their autocratic heads by oaths to them alone, and not to national constitutions as well. Von Treitschke,[4] foe of democracy, gave repeated illustrations from the history of France of the overthrow of constitutions by the unquestioning support of a standing army, and he might have added Prussian instances. He said: "The duty of unconditional obedience leads to the further necessity for a single oath of allegiance, setting forth with unmistakable clearness to whom that obedience is due. There must be no reservations when a man pledges himself to sacrifice his life. It is sheer madness to make youths, who are mostly drawn from the lower classes, promise to obey not only their King, but the Constitution as well, thereby expressly setting before them the alternative of doing one or the other in a given case." A standing army of any appreciable size is not compatible with democratic government. The alternative of a standing army is therefore a well-regulated militia, or national guard, as we call it now. Accordingly the right of the people to bear arms is incorporated in the federal constitution and generally in state constitutions.

Conditions and customs have changed since 1689 in England and 1789 in America. "As it is not customary in civilized communities to carry weapons about the person, the habit of doing so may be regarded . . . as an indication of lawlessness." [5] Here is an apparent conflict between the police power and a constitutional right, literally interpreted, but the true meaning is not the literal. The constitutional guaranty has not prevented the very general enactment of statutes forbidding the carrying of concealed weapons, or the carrying of arms in a threatening manner, or "the possession . . . of certain deadly weapons not generally used for legitimate purposes, such as metallic knuckles, or dynamite bombs." [6] The constitutionality of such legislation has been upheld.[7] The principle is established "that constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order, and security, and that regulations manifestly demanded by these requirements are valid, provided they do not nullify the constitutional right or materially embarrass its exercise." [8]

Though one's right to bear arms in the literal sense of the words is limited by regulations imposed in the interest of public order, still one has the right of self-help and self-defense. In early times the right was more extensive than at present, and there has been change in recent years. In

1884 a British court[9] decided that one could not take an innocent life to preserve one's own life. Yet if a person is attacked with an apparent intention to kill or do great bodily injury, there is the right to take the guilty life. "One need not wait until the danger is certain; it is sufficient if it is apparent."[10]

Though there is danger to society from the carrying of arms by criminals and irresponsible persons of a too inflammable sense of honor, so that laws ought to be general for the regulation of the purchase, possession, registration, and licensing of deadly weapons, there is also danger from the organization of military companies not under direct responsibility to the civil authorities.[11] There is danger that the organization of private companies and their employment for private defense will degenerate into private warfare. Therefore some states do not permit independently organized companies to drill or parade with arms without a license of the governor. Some states, furthermore, do not permit armed bodies of Pinkerton men[12] to act as militiamen, policemen, or peace officers who are not duly authorized as such under the laws of their states.

4. *An Armed Citizenry*

If there is danger to the state in the unrecorded and unregulated arming of private citizens, and danger in privately organized military companies of the character described, and if there is danger to the nation in a standing army of such strength as to tempt the choice of a chief magistrate by force rather than by free election, the alternative, as previously suggested, is an armed citizenry.

The local police may be supplemented by a home guard, men of approved character who are given the right to bear arms and make arrests. These men with badges of authority and no salary are especially useful in enforcing traffic rules in rural districts. The local police should be relieved from local political domination and made essentially a part of the state police system, receiving subsidies from the state treasury, the main body of which system would be the regular state police, a semi-military force. This force would work in cooperation with a national police force, and receive federal subsidies for federal service. The national police would be a military body, detached from the army and loaned to the department of justice.[13] In November, 1918, the size of the army of the United States was 3,665,000 men.[14] The General Staff[15] prepared a bill which was submitted to Congress, proposing that the approximate size of the army in peace time should be 500,000, but the army was rapidly reduced till June 30, 1927, it numbered somewhat over 13,000 officers and nearly 120,000 enlisted men.[16] This number is not excessive, one thousand for each million of population. The non-military services of the army are great, the more spectacular being the aid given to flood sufferers. The strength of the National Guard Sept. 30, 1926, was almost 12,000 officers and 169,000 men.[17] In that year it was said: "The law provides for an ultimate strength of 435,000."[18] In 1919 the Committee on Military Policy of the American Legion[19] advocated "a national military and naval system based on universal military obligation, with a relatively small regular army and navy, and a citizen army and navy capable of rapid expansion." May the author humbly suggest that children should begin at an early age to take physical exercises which would progressively lead to military training, so that in their 20th year one million young men and young women would undergo one month's training in summer camps, preceded and followed by drill in their home towns?[20] The object would be health, morals, patriotism, and possible service in keeping the peace and in defense of the country.[21]

II. The Quartering of Soldiers in Private Houses

The Third Amendment of the federal constitution commands that, "No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." Says Cooley: "It is difficult to imagine a more terrible engine of oppression than the power in the executive to fill the house of an obnoxious person with a company of soldiers, who are to be fed and warmed at his expense, under the direction of an officer accustomed to the exercise of arbitrary power, and in whose presence the ordinary laws of courtesy, no less than the civil restraints which protect person and property, must give way to unbridled will; who is sent as an instrument of punishment, and with whom insult and outrage may appear quite in the line of his duty." [22] What Cooley described as so terrible, drawing his illustrations from the dragonades of Louis XIV, has been experienced by our contemporaries upon an unexampled scale. It is well, therefore, that our constitution, our political creed, should pronounce against a practice which so easily becomes an abuse.

III. The Privilege of the Writ of Habeas Corpus

1. *Definition and Constitutional Provisions*

The writ takes its name from the characteristic words employed in the writ when Latin was the language of process and records. It means, of course, "that you have the body." Bouvier's definition is as follows: "A writ directed to the person detaining another, and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf." [23] This is the most famous writ of the law, employed for many centuries to remove illegal restraint upon personal liberty, no matter by what power imposed. It is often called the great writ of liberty. The date of its origin cannot be traced, but it was already employed in the reign of Edward III. In its early history the writ was a means of relief from private restraint. In the time of the Tudors it was employed against the crown. In the struggle with the Stuarts this writ was one of the great subjects of contention. The advocates of liberty insisted that habeas corpus was a constitutional protection against illegal executive action. The advocates of authority made it a dead letter. Finally in 1679 in the reign of Charles II the Habeas Corpus Act was passed completing the protection of the writ.[24] Thereafter under heavy penalties persons charged with detaining others unlawfully were compelled to bring their prisoners into court where they might be discharged if illegally imprisoned, or admitted to bail if bailable. The act was adopted in the American colonies, and its provisions were enacted into law by the legislatures of the states at a later period. It was so prized that it became a fundamental right guaranteed by federal and state constitutions. It is found not in the amendments to the federal constitution but in Article I, Section 9, of the original constitution — an article dealing mostly but not exclusively with Congress. Its terms are as follows: " The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." In the Pennsylvania constitution the guaranty is found not in the article establishing the legislature but in the bill of rights. It is expressed in Article I, Section 14, as follows: " All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it." Seven of the states of the union place the power of suspension in the legislature, but all the state constitutions guarantee the privilege of the writ.[25] This writ is intended for the protection from illegal restraint whether by private parties or public officers, either administrative or judicial. It is principally a judicial limitation upon the power of the executive.

How different is the conception of the English and American law from the German and Prussian! Howard,[26] describing the law of the German Empire in 1906, said: " By the terms of this Prussian law, martial law may be declared (a) in case of war, in those parts already invested by the enemy or threatened with such investment; (b) in case of an insurrection, whether in war or peace, when there is pressing danger to the public safety. In either case it is the Kaiser who decides whether the conditions exist which justify the declaration of martial law. The state governments have no right either of assent or of dissent, nor is the question to be submitted to the action of Bundesrat or Reichstag, as falling within such jurisdiction or competence as they may claim under the constitution or laws of the empire." Similar to this German declaration of a state of siege is the French suspension of constitutional guaranties, only this is by the representatives of the people who are responsible to the people, as are our president and Congress.

An interesting illustration of the American doctrine of subordination of the military to the civil power is presented by the case of the millionaire slacker, Grover Cleveland Bergdoll. On a Thursday,[27] Bergdoll was on trial before a military court-martial on the charge of desertion. After hearing the report of the lunacy commission that he had sufficient mental capacity to justify his being brought to trial and had the necessary criminal mind to commit the wrongful acts charged against him, the court-martial adjourned till Saturday, the continuance of the trial being dependent upon the result of the habeas corpus proceedings on Friday in the federal district court. His attorneys had made application for the writ. Accordingly the slacker was brought handcuffed from Governor's Island to the court. At the hearing his counsel presented the legal argument that Bergdoll had not been inducted into the army by operation of the draft act and the service of notice because he evaded service and ran away. Furthermore it was claimed that he could be charged only with a misdemeanor and was entitled to a jury trial. Judge Hand characterized the petition as utterly destitute of merit and dismissed the writ. The slacker was returned to Governor's Island for the continuance of the trial on the morrow. Though the application was denied, yet the proceedings were a vivid picture of the subordination of the military to the civil power in this country.[28]

We go back farther in our history for a second illustration. In the war of 1812 when General Jackson was in command at New Orleans and the city was threatened with invasion, he declared martial law, arrested an editor who criticized him, refused to recognize a writ of habeas corpus issued by a federal district judge, but arrested the judge and deported him from the city. Yet shortly afterward when the judge returned upon notice of the conclusion of a treaty of peace, General Jackson was summoned before him to answer for contempt of court. The sentence was a fine of $1,000 which the general paid at once. His friends offered to reimburse him but he declined, yet years afterward he accepted a congressional grant of $2,700, being the amount of the fine and interest, as compensation for a judicial wrong. Yet the judge seems to have acted within the limits of his authority, and to have made the military power bow before the civil.[29]

2. *Suspension of the Writ; Where Vested*

In the case of Ex parte Merryman,[30] Chief Justice Taney challenged the power of President Lincoln to suspend the writ.[31] He said: " I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privilege of the writ of habeas corpus or arrest a citizen except in aid of the judicial power. He certainly does not faithfully execute the law if he takes upon himself legislative power by suspending the writ of habeas corpus, and the judicial power also by arresting and imprisoning a person without due process of law." [32] In the case of Ex parte Milligan,[33] which did not turn directly on the power of the president, one of the justices said that martial law proper may be " called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in case of justifying or excusing peril, by the President, in time of insurrection or invasion, or of civil or foreign war, within the districts or localities where ordinary law no longer adequately secures public safety and private rights." [34] There was an overwhelming necessity, morally, if not legally, justifying the president in his action.

3. *Effect of the Suspension of the Writ*

When the president, acting under the authorization of Congress, or possibly acting upon his own authority, at a time of overwhelming necessity, relying upon congressional ratification of his act, suspends the writ, the courts have still the right to issue it. But the suspension of the writ justifies the agents of the government in refusing to produce their prisoners.

Suspension of the writ falls short of the establishment of martial law. There may be one without the other, but generally the conditions that justify the suspension of the writ also justify the establishment of martial law. Yet it is perfectly conceivable that threatened insurrection or revolution would justify the arrest and detention of the disturbing elements, this being done upon suspension of the writ, and yet there might not be justification for the trial of such parties by courts-martial, as would naturally be done if martial law were substituted for the ordinary civil government. The purpose of the suspension of the writ may be then only to arrest and detain dangerous elements without interference by the regular courts, keeping such parties locked up till the trouble has passed, and then to permit their trial by the regular courts.[35]

IV. LIMITATIONS ON MARTIAL LAW

1. *Martial Law in Time of Peace*

In time of peace it may be that resistance against the government is too strong for the ordinary methods to be effective, and yet the resistance may not rise to the proportions of armed rebellion. It may be necessary to call out the militia or employ the regular army to aid the civil authority. It is martial law in the narrow sense when the military arm does not supersede civil authority, but is called upon to aid it in the execution of its civil functions. In such cases though martial law is declared, its legal effect is only to warn citizens not to commit acts which render more difficult the restoration of order. No new powers are given the executive; no civil rights are suspended. Even Congress cannot suspend the writ of habeas corpus, for the courts will judge the necessity not to exist. This is martial law in time of peace.[36]

2. *Martial Law in Time of War*

In time of war martial law has a wider meaning. In the theatre of active military operations where the courts are closed and the civil administration is deposed, there is no power left but the military. Then the military power governs by martial law. Not only is the writ of habeas corpus suspended so that persons may be arrested and detained without being subject to production in court, but also there may be trial by military courts and punishment, even with death.[37] The concurring minority of the court in the Milligan case insisted that the measure of necessity for martial law in time of war was not the closing of the courts but the existence of a condition in which public safety and private rights could not be secured through the courts. Therefore Willoughby,[38] agreeing with the minority on this point, holds that in time of war in threatened or disturbed districts Congress may declare martial law so far as necessary, and persons may not only be arrested and detained, they may also be tried by court-martial and punished. In cases of necessity this may be done even where the ordinary courts are still open. This is martial law in the broad sense. Thus martial law in time of war means that in certain districts within the country the military supersedes the civil power. In such a time and in such localities civilians may be tried by courts-martial or military tribunals.[39]

3. *Military Law Distinguished from Martial Law*

Military law is enforced both in time of peace and in time of war. It is found in acts of Congress prescribing rules and articles of war. Military law governs the national forces themselves. Under it trials are held in courts-martial. Civilians are not subject to military law.[40]

4. *Military Government Distinguished from Martial Law*

Military government must be distinguished from martial law and military law. Martial law applies to our own country and to loyal states within the country, not to states to which belligerent rights are conceded, and which are treated as foreign territory. But military government applies to occupied territory in lands outside the United States and to occupied territory of states in rebellion, and therefore treated as foreign states. Military government exercises its power over all the people of the occupied territory. It becomes the *de facto* government, and may utilize the local courts and officers and may enforce the local laws of the occupied territory if it chooses, or it may set up new organs of government and enact new laws.[41]

Thus we distinguish sharply between martial law, military law, and military government. In martial law in time of peace the executive is given no additional power and the citizen loses no right. In martial law in time of war Congress can give the president only such powers as are absolutely necessary to protect the public safety. In military law the military authorities are held to strict accountability to Congress and the civil power. Even in military government the courts find limitations upon arbitrary power.[42] At every point in our governmental system we find the paramount authority of the civil power. The dominance of the civil power means the ultimate control in the hands of the people, expressed in free and fair elections.

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[1] New York Commission of 1915, *Index Digest of State Constitutions*, pp. 40 ff.

[2] Dicey, A. V., *Law of the Constitution*, pp. 442 ff. Terry, B., *History of England*, p. 813. Stephen's *Commentaries*, Vol. II, pp. 569 ff.

[3] Lieber, F., *On Civil Liberty*, p. 114.

[4] Von Treitschke, *Politics*, Vol. II, pp. 399 ff.

[5] Freund, E., *Police Power*, p. 90.

[6] Freund, E., *Police Power*, p. 90.

[7] State v. Reid, 1 Ala. 612 (1840).

[8] Freund, E., *op. cit.*, p. 91.

[9] Reg. v. Dudley, 15 Cox Cr. Cases 624. Andrews, J. D., *American Law*, Vol. II, p. 576.

[10] *Ibid.*, Vol. II, p. 578.

[11] Freund, E., *op. cit.*, p. 91.

[12] *Ibid.*, p. 93.

[13] Fosdick, R. B., *European Police Systems*, pp. 91 ff.

[14] *American Year Book* for 1918, p. 330.

[15] *Ibid.*, for 1919, p. 328.

[16] *Ibid.*, for 1927, p. 252.

[17] *Ibid.*, for 1926, p. 369.

[18] *Ibid.*, for 1926, p. 380.

[19] *Ibid.*, for 1919, p. 330.

[20] Brooks, R. C., *Government and Politics of Switzerland*, pp. 250–260.

[21] Hankey, D., *A Student in Arms*, pp. 263 ff.

[22] Cooley, T. M., *Constitutional Limitations*, p. 375.

[23] Bouvier, J., *Law Dictionary*, Vol. I, p. 732.

[24] Green, J. R., *History of English People*, Vol. III, p. 409. Stephen's *Commentaries*, Vol. I, p. 83.

[25] New York Commission of 1915, *op. cit.*, pp. 746 ff.

[26] Howard, B. E., *The German Empire*, p. 354.

[27] Thursday, Mar. 4, 1918.

[28] See related case of U. S. v. Bergdoll, 272 Fed. 498 (1921).

[29] Baldwin, S. E., *The American Judiciary*, pp. 299 ff.

[30] Ex parte Milligan, 4 Wall, 2 (1867).

[31] Ex parte Merryman, Circuit Court of U. S. for Md., April term, 1861, *Taney's Reports*, 246.

[32] Willoughby, W. W., *Constitutional Law*, Vol. II, pp. 1255 ff.

[33] Ex Parte Milligan, 4 Wall. 2.

[34] Hall, J. P., *Constitutional Law*, p. 333, quoting Chief Justice Chase, who spoke for himself and three other justices.

[35] Willoughby, W. W., *op. cit.*, Vol. II, pp. 1254 ff.

[36] *Ibid.*, Vol. II, p. 1234. Dicey, A. V., *op. cit.*, pp. 280 ff.

[37] Willoughby, W. W., *op. cit.*, Vol. II, pp. 1241 ff.

[38] *Ibid.*, Vol. II, pp. 1251 ff.

[39] Dicey, A. V., *op. cit.*, pp. 538 ff.

[40] Thayer, J. B., *Cases on Constitutional Law*, Vol. II, p. 2394. Dudley, E. S., *Military Law and the Procedure of Courts-Martial*, p. 5.

[41] Willoughby, W. W., *op. cit.*, Vol. II, p. 1236.

[42] Dooley v. United States, 182 U. S. 222.

CHAPTER XIX

THE RIGHT TO GRAND AND PETIT JURIES

1. *Relation of This to Preceding Rights*

Our fathers had an abounding belief in the fairness and integrity of their fellow citizens and confidence in their collective wisdom when informed and steadied by " a stake in the country." Therefore they were so insistent first for the group of rights assuring the free expression of opinion. Thus succeeding generations of freemen in a country of vast undeveloped resources could learn how to perform their public duties and how to acquire by their own exertions a reasonable competence. Their second thought was given to the arming of the citizens so that they might not be without military strength among the nations of the world, and that the military authorities, however dominant they might seem to be in time of crisis, should be brought to realize their responsibility to the civil authorities just as soon as the crisis had passed. Now we will see that their solicitude was next for such a degree of domestic peace and order, in times undisturbed by actual war, as may be attained by an independent and strong-willed people. In every period even among the most religious and circumspect there were adventurous interlopers who rebelled against the restraints put upon them here just as they had in the homelands. They were rebels, vagabonds, and ne'er-do-wells — a small but troublesome class. The colonial governments employed the same methods to meet these ills as were employed in England, and the same protection against injustice and oppression was set up here.[1] The common law with the jury system as an essential part was held to be a sacred inheritance, protecting persons charged with crime and civil wrong from injustice, and protecting society from criminals and wrong doers.[2]

2. *The English Common Law Compared with the Roman Civil Law*

There is an age-long contest raging for world mastery between two systems of law, the English common law and the Roman civil law.[3] One originated in a tiny city-state on the low hills by the Tiber; the other on an island in the Atlantic where German tribes in comparative isolation developed out of their primitive customs the English common law. The Roman civil law is the law of all the European countries which were subject to Rome, England and Turkey excepted. It is also the law of Germany, Russia, the Baltic lands, Latin America, the colonies of continental Europe throughout the world, and parts of the British and American empires. The English common law is fundamental in the jurisprudence of the American empire, Louisiana and the unincorporated territories excepted, of the British Isles, Scotland excepted, of Canada, Quebec excepted, and of the other colonies including Australia and New Zealand, but South Africa and British Guiana excepted. It is making steady progress in India against the chaos of local customs.[4]

A Mohammedan lawyer, a native of India, said in England: "I am first and foremost an Indian. . . . Government by the people, for the people and through the people, is a very natural adjunct of government by the British. . . . English education has given to us Indians a common language, common aspirations, and a common patriotism."[5] This eastern scholar who had expressed these ideals for his own people, was made attorney-general for India. In these few words he hit upon the distinguishing marks of the English legal system. It protects the life, liberty, and property of the subject from the arbitrary action of the executive and of subordinate rule-making bodies. It takes the people into partnership in the enforcement of law. Accordingly a characteristic institution of the English was trial by jury.

On the other hand the Roman civil law, as it came from the imperial jurists, exhibited less solicitude for liberty than for order. Its punishments were swift and certain, and justice was administered from above and not with the cooperation of the people. It did not wait till the subject had abused his liberty, but hedged him about with preventive measures. The English injunction [6] is essentially a Roman importation, foreign to the fundamental ideas of English jurisprudence. Coercive government and superimposed government are basic suppositions of the Roman civil law. Therefore during the period of the Renaissance and later when the European monarchs were straining to establish absolute power, and to crush out feudal customs and Germanic liberties the law of the Cæsars was the appropriate instrument of their tyranny. A characteristic institution of the Roman civil law was trial by judges, both as to fact and as to law.

These two systems, one emphasizing liberty and the other order, have acted and reacted on each other. England, the home of parliamentary government, individual liberty, and trial by jury, has seen its characteristic institutions adopted, in some measure at least, in every country in Europe. On the other hand from the earliest times the Roman civil law was the source of large sections of the law enforced in England, to the exclusion of the native common law. Reference is made to equity, admiralty, and testamentary jurisdiction. Consequently our inherited legal system is in part English common law, in the narrower sense, and in part Roman civil law. We began by saying that these two systems are struggling for world mastery. Probably they will both attain the mastery through the praiseworthy custom of nations borrowing from each other whatever institutions and laws are found to be advantageous. Louisiana began with the civil law as the foundation of her system, but the influence of neighboring common law states has been so great that now both systems have coalesced. As continental peoples become self-governing they demand the English safeguards of their liberty; as Anglo-Saxon peoples learn to trust their executives, chosen by themselves, they are less insistent upon curbing executive action. In England itself the judges do not assume political functions; they are so trusted for their impartiality that the people waive the right even to jury trial in many kinds of cases.[7] The paradox is striking. Countries with an autocratic tradition adopt a limited use of the jury as an instrument of democracy; England as it becomes more democratic finds the jury less essential to democracy and justice. The world is approaching a common standard.

3. *The Grand Jury and Prosecution by Information*

(1) *Definitions*

In considering the jury system it is appropriate to begin with the ordinary common law method of charging persons with crime, and compare it with the Roman law method. We set down a definition of a grand jury. It is a jury the province of which is to determine whether indictments shall or shall not be brought against alleged criminal offenders.[8] "The grand jury is a body composed of not less than twelve and not more than twenty-three persons; and in the federal courts it is provided by act of Congress that the number shall not be less than sixteen nor more than twenty-three. Twenty-four, however, are summoned, but never more than twenty-three are sworn, lest there be two full juries, one of whom is for finding a true bill, the other for ignoring it." [9] The number, therefore, required to bring an indictment is twelve. In Pennsylvania the panel is drawn from a jury wheel in which the names of qualified persons have been deposited by jury commissioners. Grand jurors sit in absolute secrecy and may pass upon bills of indictment presented by the prosecuting attorney or may of their own motion make presentments. Only witnesses in support of the prosecution are examined, and no evidence is admitted in favor of the accused.[10]

Much simpler is the method of prosecution by information which is characteristic of the Roman law, though it was also known to the common law. "Criminal information differs from an indictment in that in the former the accusation or charge is presented directly by the . . . prosecuting officer, while in the latter the accusation proceeds directly from a grand jury, upon whose oath it is based."[11] The French have perfected the Roman law method of accusation. The procureur of an arrondissement, whom we might call district attorney, is associated with the police in the police judiciary, and they act together in the discovery and prosecution of crime. The procureur brings his complaint of a serious offense immediately to the Juge d'Instruction or investigating officer of the same arrondissement. This officer examines the prisoner in secret within 24 hours of his arrest in the presence of his counsel, goes to the prisoner's home or the place of the crime, and searches for whatever may be of evidential value. He examines the witnesses produced by the police or named by the prisoner, hearing each one separately. The prisoner and the witnesses may withhold no evidence which will enlighten the investigator upon the true nature of the case. He makes a full record of all the evidence taken, both oral and documentary, and decides whether the offense is a contravention (petty offense), a delict (misdemeanor), or a crime (felony). If a petty offense, the case goes to a local magistrate or police court. If a misdemeanor, it goes to the correctional court of the arrondissement. If a felony, he sends the record up to the Court of Appeal, corresponding to our Superior Court, where it is assigned to the chamber of accusation. This chamber may be compared with our grand jury, but it is composed of experts, judges learned in the law, not laymen brought in by chance, and they have before them the full record, not simply the evidence against the prisoner. From their larger experience and broader knowledge of the law they may send back the case to a court of the arrondissement, but if they decide that there is sufficient evidence for a prosecution for felony, they bring in an accusation, drawn up by the procureur général of the Court of Appeal district. Then the accusation or indictment is sent down to a Court of Assizes, consisting of three judges and twelve jurors. This trial court is intermediate between the correctional court and the Court of Appeal. The accusation or indictment is a solemn affair. A suspect is not subjected to the shame of indictment for crime unless there is the proximate certainty that he is guilty.[12]

(2) *Constitutional Provisions*

In England prosecution by information easily became an instrument of tyranny, and it was limited by statute. The constitution of the United States, 5th Amendment, provides that, " No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." Accordingly indictment is necessary to the prosecution of felonies in federal courts, but there may be either indictment or information in the prosecution of misdemeanors. The Pennsylvania constitution provides in its bill of rights that, " No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office." [13] Both felonies and misdemeanors are indictable. The constitution of this state, therefore, gives greater protection to liberty than does the federal constitution. The constitution of California on the other hand permits prosecution by information in all cases of felony and misdemeanor.[14] The tendency of western states is to adopt the more expeditious and less expensive method of charging persons with crime. The tendency in the more conservative states is to cling to the historic protection of liberty.[15]

(3) *History and Appraisal*

Having compared indictment by grand jury with prosecution by information, it is interesting to trace the origin of this unique English institution. Mr. Justice Wilson,[16] first law lecturer at the University of Pennsylvania, traced the English jury system to the Athenian juries of five hundred to fifteen hundred members, and to Anglo-Saxon customs, but more recent investigators, like Maitland,[17] hold that it was a French institution, brought over by the Norman invaders. The Conqueror used the inquest to obtain all manner of information from his new subjects who were liable to severe penalties if they gave misinformation.[18] It did not arise out of their customs, and at first it brought them only danger and expense. Yet by the time of Henry II the inquest or question was employed in private disputes, competing with older methods of trial.[19] It was a method of determining questions of fact, best known by the men of the neighborhood, who constituted the jury. It was in 1166 when the method was first applied by Henry II for the purpose of charging men with crime.[20] When that king sent his justices down to the counties each hundred, a division of a county, was represented by a jury. Such a jury reported to the justices upon all sorts of matters, and they also presented such of their neighbors as they charged with crime. These juries were accusing juries, juries of presentation. They did not hear testimony after they assembled as a jury, but they made charges upon oath against men whom they knew as wrong-doers by the common fame of the countryside. Later these juries from the several hundreds of a county were replaced by a jury drawn wholly from the county as such. This was the grand jury. The meaning of the early grand jury was that the people were taken into partnership in keeping the king's peace. In course of time the grand jury became a protection of the liberty of the people, for with a grand jury it was difficult to bring a man to trial who was supported by the public sentiment of his county as an innocent man. At the same time tyrannical kings used the process of information to bring troublesome opposers to trial. The people counted the right of indictment as a valuable privilege, and laws were passed limiting the resort to information. The Fifth Amendment of the federal constitution was based on these English laws. Grand juries under a courageous prosecuting attorney often assure a large measure of popular support to him in his proposed reforms, and sometimes under a corrupt prosecuting attorney the jurors bring in their own presentments, and reform follows their exposé. Yet our conclusion must be that the grand jury belongs to the age of the ox cart and the tallow candle.

4. *The Petit Jury and Trial Without Jury*

(1) *Definition*

If the procedure in charging a man with crime has a place in a bill of rights, how much more appropriate it is that the procedure of the trial itself be guarded in the bill of rights! If indictment by grand jury is a peculiar feature of English jurisprudence, trial by petit jury is a more distinctive and important English institution. Here as in treating of indictment it is fitting that we begin with a definition of a common law jury. The jury must be composed of twelve persons. It must be drawn from the vicinage, theoretically from the whole number of qualified citizens of the county or district where the trial is held. It must be impartial, and to this end is drawn by lot from lists of jurors prepared by designated officers. The verdict must be unanimous.[21] On the other hand we are familiar in equity suits and admiralty causes with trials before judges without juries. The judges are then judges of both fact and law. Also petty offenses in both federal and state courts are summarily dealt with, the aid of a jury not being required.[22] Decision by a judge or a bench of judges was a characteristic feature of the Roman civil law.

(2) *The Origin of Jury Trial*

If we have been interested in the origin of the grand jury, the more will we be interested in the origin of the petit jury. We have seen that the general conception of the inquest was brought from Normandy and was employed by the Conqueror in various ways to obtain information as to questions of fact from his subjects. The grand jury was one application of the method developed by Henry II in 1166. Of course it was the grand jury in its primitive form. He provided that a jury of presentation should charge a man with crime, but he did not provide a petit jury trial for the indicted man. In certain cases the person charged with offense could be freed by his own solemn oath and by the oath of his friends that he was innocent. This ancient custom was called compurgation, and the oath-helpers were compurgators.[23] In graver charges and in cases where a man had been repeatedly accused his innocence could not so easily be established. Yet the court said in effect: "This man and his compurgators swear that he is innocent; the grand jury swears that by common fame he is guilty. We have no way to tell the truth; therefore we must appeal to God to perform a miracle." The court appealed to God to decide on which side was the truth. This was done by resort to the ordeal.[24] Most typical were the ordeal of the hot iron, the ordeal of hot water, and, most dreaded of all, the ordeal of cold water. In this ordeal the accused was thrown into water; if he staid down he was innocent, but if he floated he was guilty. So if he drowned his character was vindicated, but if they drew him out alive he was put to death as a criminal. In the less terrible forms of the ordeal if the accused satisfied the test and was declared innocent, he was nevertheless banished from the kingdom.

When Magna Charta was granted by King John in 1215, there were these forms of trial in criminal cases — compurgation and ordeal together with wager of battle.[25] To be sure the primitive form of trial by petit jury had been introduced in civil cases. With this understanding of the forms of trial we read the words of King John or of Henry III, his son, in slightly expanded form: "No freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man, either right or justice."[26] It is plain that in criminal cases the real decision was made by the grand jury when they charged one of their neighbors with crime, while in civil cases the decision as to fact might be made by the newly introduced petit jury.

In 1215, the same year of Magna Charta,[27] the Fourth Lateran Council [28] of Innocent III expressly forbade the clergy to participate in the ceremonies of the ordeal. The church had become strong enough to abolish this barbarous institution. Henry III began his reign in 1216, and recognized the action of the church. When he sent out itinerating justices he gave curious instructions how temporarily to meet the changed situation. "Persons charged with the graver crimes, who might do harm if allowed to adjure the realm, are to be imprisoned, without endangering life or limb. Those charged with lesser crimes, who would have been tried by the ordeal, may adjure the realm. In the case of small crimes there must be pledges to keep the peace." [29] So when trial by ordeal was abolished only trial by compurgation and by wager of battle were left. So if a man were not tried in these ways, which indeed had only limited application, the justices left him to rot in jail, or they banished him, or they freed him upon his giving bond to keep the peace.

Now there was slowly introduced a new method of trial in criminal cases which was already employed in civil cases. A person charged by a jury of presentation consented [30] to be tried by a second jury, a jury of recognition. The jury of presentation we call a grand jury; the jury of recognition we call a petit jury. This second jury was also composed of neighbors. They were supposed to know the man and the facts. They were more like witnesses than jurors as we use the word to-day. These twelve neighbors out of their knowledge of the accused man and the facts decided whether the accusation of the first jury was true or false. Out of this crude form the present jury system has been developed.[31]

5. *Limitations of Federal and State Constitutions Upon the Denial of Jury Trial*

It is difficult to see in the primitive jury of six or seven hundred years ago more than a vague family resemblance to its descendant, the common law jury, as defined in the preceding section. Yet to the distant progenitor must be attributed some of the irrationalities of the present system as well as some of its most excellent features. While the definition is the current one, we must not conclude that a common law jury and the jury system, as it existed in England and the colonies in 1776, are one and the same thing. Then and at every other time there were juries in England and in her colonies after their settlement which departed in one respect or another from the marks of a common law jury as stated in the definition. For example the proprietary lands of the Duke of York, now comprising four states, had juries of six. England [32] and Canada [33] employ them still. Many of our states do. The term jury, accordingly, is broader than the term common law jury.[34]

In the body of the federal constitution, Article III, Section 2, we find the guaranty of jury trial in criminal cases in these words: " The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." Three of the amendments go into greater detail. The Fifth Amendment guarantees indictment in federal criminal cases involving felony, except in cases arising under military law. The Sixth Amendment guarantees " a speedy and public trial by an impartial jury " in all federal criminal prosecutions. The Seventh Amendment guarantees, " In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury." In partial fulfillment of this last guaranty the judicial code gives jurisdiction to district courts of all suits of a civil nature at common law or equity . . . where the matter in controversy exceeds . . . three thousand dollars" and the cases come constitutionally under the federal judicial power.[35]

At first blush, before one is corrected by judicial decisions to the contrary, it would seem axiomatic that our fathers were intending to establish the jury system, so highly prized in England and in the colonies, as a general principle, and that it would be a function of Congress to pass acts giving such detailed application of that general principle as would meet the particular needs of the time. It would be passing strange that Congress would not have the powers of colonial legislatures before 1776 and the present dominion parliaments.[36] In the author's recent travels in Alaska he made frequent inquiry as to the attitude of the people to the question of the proper number for an Alaskan jury, and he heard only approval of the law which Congress passed, authorizing juries of six, a law which was declared unconstitutional by the Supreme Court.[37] We have seen that Congress permitted Hawaii during the brief transition period after annexation to retain her jury laws which provided for convictions by less than a unanimous vote, and the Supreme Court upheld this passive action of Congress on the ground that the right of jury trial is not fundamental.[38] Similar laws for the unincorporated territories were upheld on the same principle. But the hands of Congress are tied now in Alaska, Hawaii, and the District of Columbia, no matter what the conditions may be. Federal juries throughout the country must be of twelve jurors, and they must come to a unanimous verdict. This requirement was fastened on a common law jury in the early centuries before the principle of decision by majority in deliberative bodies was discovered in England. In those times the decision of a question was made by the country or by a corporation, a guild for example, by unanimous vote. The minority was expected to give way. Such was government by consent. Accordingly it was applied to juries as representing the country. To help them reach unanimity they were denied food, drink, fire, and candle till they came to one opinion. If they had not reached a verdict when the justice left the place of trial he took them along in a cart. Subjected to such gentle persuasion the most obdurate yielded.[39] Now one corrupt juryman may hang up a verdict, and there is no way to hang the juryman. Busy men object to the waste of time which the jury system, as developed in this country, involves. A neighbor druggist of the author spent nine weeks on a federal jury. To meet the evil measurably all civil cases between citizens, except the most important, might be thrown into state courts, since state constitutions are the more easily amended.

Jury trial is also very generally guaranteed by state constitutions. Many constitutions provide that the right to jury trial shall remain inviolate, particularly in criminal cases. Not so great a number make the specific guaranty that the right in civil cases shall remain inviolate, but a very considerable number provide for waiver with consent of parties signified in a manner prescribed by law, or in words of similar import. In criminal cases waiver is not permitted in many states, and then it is apt to be limited to cases not amounting to felony. As to the number of jurors to constitute a jury many states permit a number less than twelve in inferior courts. In various constitutions provisions are made for juries of four, six, and eight in such courts. As to the number necessary to render a verdict in civil cases conservative states like South Carolina stipulate that there shall be unanimity in all cases tried in general trial courts. Progressive states, mostly western and southern, make provisions like that of Kentucky: The legislature may provide that in general trial courts, three-fourths or more of the jury concurring may render a verdict, but when the verdict is rendered by less than the whole jury it shall be signed by all jurors who agree to it. As to the number necessary in criminal cases all the states but six require a unanimous verdict, and these six seem to require it in cases amounting to a felony.[40] None have gone so far as the French in providing trial by judges alone in civil cases and in criminal cases amounting to a misdemeanor, and in providing for jury trial only in criminal cases amounting to a felony, and then for jury trial with majority verdict. Professor Callender[41] reports that in England jury trial is only one method of four employed to try issues of fact, that the demand for jury trial is not always allowed, that extensive use is made of a system of commercial arbitration, and that in 1901 out of 763,000 actions in county courts only 1001 were heard before juries. Excellent models of justice and law enforcement are found in the modern democracies of France and England. We may conclude that the right of jury trial is a valuable protection of liberty when restricted to criminal cases involving felonies, misdemeanors, and certain kinds of criminal contempts, as now provided in federal law,[42] and that waiver should be permitted in criminal cases only in cases involving misdemeanors.

[1] Bolles, A. S., *Pennsylvania*, Vol. I, p. 257.

[2] Shelton, T. W., *Spirit of the Courts*, p. 201.

[3] Bryce, J., *Studies in History and Jurisprudence*, pp. 72 ff.

[4] *Ibid.*, pp. 108 ff.

[5] *Review of Reviews*, Vol. 43, p. 232.

[6] Burdick, F. M., "Injunction," in Johnson's *Cyclopedia.*

[7] Maitland, F. W., *Constitutional History of England*, p. 474.

[8] Allen, F. S., "Grand Jury," in Johnson's *Cyclopedia.*

[9] Edwards, G. J., Jr., *The Grand Jury*, p. 45.

[10] Allen, F. S., *op. cit.*

[11] *Ibid.*

[12] Coudert, F. R., *Certainty and Justice*, pp. 110–128. Sait, E. M., *Government and Politics of France*, pp. 398 ff. Poincaire, R., *How France is Governed*, pp. 227 ff.

[13] Edwards, G. J., Jr., *op. cit.*, p. 34. Article I, Section 10.

[14] California Constitution of 1879, Art. I, Sec. 8 (Thorpe's *Constitutions*, Vol. I, p. 413).

[15] N. Y. Commission of 1915, *Index to State Constitutions*, pp. 500 ff.

[16] Wilson, James, *Works*, Vol. II, pp. 318 ff.

[17] Pollock, F., and Maitland, F. W., *History of English Law*, Vol. I, pp. 151 ff. (Second Edition, 1903.) Coudert, F. R., *op. cit.*, p. 63.

[18] Pollock and Maitland, *op. cit.*, Vol. I, pp. 143 ff.

[19] *Ibid.*, Vol. I, p. 144.

[20] *Ibid.*, Vol. I, p. 152.

[21] Cooley's *Blackstone*, Book III, pp. 351 ff.

[22] Willoughby, W. W., *Constitutional Law*, Vol. II, p. 810.

[23] Pollock and Maitland, *op. cit.*, Vol. II, p. 600.

[24] *Ibid.*, Vol. I, pp. 39, 152; Vol. II, p. 598.

[25] *Ibid.*, Vol. II, p. 600.

[26] Pomeroy, J. N., "Magna Charta," in Johnson's *Cyclopedia.*

[27] Pollock and Maitland, *op. cit.*, Vol. I, p. 171.

[28] *Ibid.*, Vol. II, p. 599.

[29] Edwards, G. J., Jr., *op. cit.*, p. 19.

[30] Pollock and Maitland, *op. cit.*, Vol. II, pp. 650–652.

[31] Holmes, O. W., *The Common Law*, p. 262.

[32] Juries in English county courts are of five. Stephen's *Commentaries*, Vol. III, p. 320.

[33] Twelve jurors were sent from the provinces in 1924 to the Arctic coast, and there formed two juries of six each to try natives for murder.

[34] Duke of York's Laws, published with *Charters and Laws of Pennsylvania*, pp. 33, 69: "No jury shall exceed the number of Seaven nor be under Six unless in Special Causes upon Life and Death, the Justices shall thinke fitt to Appoint twelve." This law bears the date of April 2, 1664, and was introduced into Pennsylvania Sept. 22, 1676. After 1666 the court of assizes had juries of twelve but the court of sessions followed the number set forth above.

[35] *U. S. Compiled Statutes to 1918*, Sec. 991(1).

[36] Macdonald, W., *Select Charters*, p. 78, "Massachusetts Body of Liberties," adopted in 1641. Parties in civil cases could determine by mutual consent if they would be "tryed by the Bench or by a Jurie. . . . The like libertie shall be granted to all persons in Criminall cases." (No. 29.)

[37] Rassmussen v. United States, 197 U. S. 516 (1905).

[38] Hawaii v. Mankichi, 190 U. S. 197.

[39] Pollock and Maitland, *op. cit.*

[40] N. Y. Commission of 1915, *op. cit.*, pp. 800 ff.

[41] Callender, C. N., *Selection of Jurors*, p. 57, and *American Courts*, p. 233. In the former he describes the selection of jurors in London. In the latter he sums up his conclusions on suggested reforms and advocates enlarging the discretion of the trial judge. Reference in the text is to a paper prepared by the professor.

[42] *U. S. Compiled Statutes to 1918*, Sec. 1245b.

CHAPTER XX

JUSTICE THROUGH JUDGES LEARNED IN THE LAW: THE DOCTRINE OF JUDICIAL REVIEW

1. *Review of Trial by Jury*

We have seen that the original basis of the common law was the primitive customs of the people, that the people were liberty loving and their law punished the abuse of liberty, and that in the enforcement of this law the king took the people into partnership through the jury system. It was the king, as a wise administrator, who imposed the system upon a reluctant people, but they came to see in the jury system a valuable right. When life was simple and the population was homogeneous,[1] juries in civil suits for damages might deal out a rough justice, but when life has become complex and the population heterogeneous, and when juries are composed of men drawn by chance and jurors are preferred who have no knowledge of the case, justice becomes so insufferably rough and raw that it is popularly held in contempt and the cry is heard, "Abolish the jury in civil cases."[2] In criminal law the French accusation is a discovery of creative intelligence;[3] the common law indictment is a survival of the inapt.[4] On the other hand both Anglo-Saxon and continental peoples demand the protection of a jury trial in criminal cases, especially those of a serious nature.[5] Yet it is irrational to require a unanimous verdict,[6] and there is no magic efficacy in the number twelve.

2. *The Determination of Fact and Law by Jurors and Judges*

A common law jury is composed of thirteen[7] men, not twelve, and the thirteenth is the most important of all, the judge. They may be street sweepings, but he belongs to the finest body of men in public life. The twelve are laymen; the one is an expert. In the early centuries of jury trial the jurors gave brief service to court attendance, usually a single day, but the judge was a permanent official. He protected society from their inexperience, from the too narrow opinion of a locality, or from the passion of the moment. At a later period the judge protects the people from executive excess and from legislative inexpertness. The jurors protected society from the exercise of arbitrary power by judges [8] who were often too subservient to their royal masters. Jurors even now protect the people from an occasional judge who is unable in his official actions to divest himself of his former affiliations and sympathies. The jurors protect the judge from the resentment of unsuccessful litigants.

The essential function of jurors was to judge facts. At first they were witnesses, not necessarily of what they had seen but of what they had been told. So it was natural in the next stage of development for the jury to hear additional evidence in court,[9] but it was long supposed that the jurors might heed evidence in their own knowledge not appearing on the court record. This came to an end in 1665 when they could no longer "find a verdict upon their own knowledge" [10] but there was "the substitution of the modern rule allowing a jury to find a verdict only on evidence produced before them in open court." [11] From this time at least the judge was a judge of fact as truly as were the jurors. He or his associates or the appellate court could grant a new trial on the ground that "the verdict was a false verdict against the weight of evidence." [12] At an earlier stage in the trial he could entertain a "motion for a directed verdict, for want of any evidence or enough evidence for a jury to act on in a case turning on a question of fact." [13] At one time in the last century there was the theory held by some judges that a judge must let a case go to a jury if there was "a scintilla of evidence," [14] but that has been exploded, and in England and in certain jurisdictions in this country judges "may express any opinion as to the weight of evidence."[15] This is no doubt a very debatable question, but it appears to the author that the judge should have equal power with the jury, as a judge of facts, with the result that a person charged with crime cannot be convicted unless both jury and judge believe him guilty. In the notorious Frank case[16] in Georgia the judge expressed to his friend, also a judge, his belief that Frank was innocent, yet he failed to grant a new trial, and was therefore justly criticized.

The essential function of judges was to judge the law. At the first they were the only highly trained men in the court. Many of these itinerant judges were churchmen, bishops, who knew the canon law, the policy of the central court of the king, and whose experience as judges brought them a general knowledge of the customs of the realm. But the jurors knew best the local customs, and at every period there were questions which could not be answered by a jury without judging law as well as fact. It was on the basis of such precedents that Andrew Hamilton persuaded the jury in the Zenger case in 1735 to render a verdict against the judicial finding of the law,[17] and the same thing occurred again in New York in the case of Barnes v. Roosevelt[18] in 1915. The theory was formerly popular and now is incorporated in some state constitutions and in the law and custom of other states that jurors are judges of fact and law in both libel cases and other cases generally.[19] Judge Simeon E. Baldwin tells the following incident of Judge Henry Baldwin of an earlier generation.[20] Mr. Justice Baldwin of the United States Supreme Court, a Jacksonian Democrat, came to the bench in 1829 believing that jurors ought to have the right to judge of both fact and law, and charged his juries in accordance with his belief. A man was tried before him for forging notes of the United States Bank. The counsel of the accused claimed that the law creating the bank was unconstitutional, and proved it by reading the message of President Jackson. This was an imposing argument to the Jacksonian Democrats on the jury. But Mr. Justice Baldwin felt himself obliged to charge the jury that if juries were to exercise the power to declare acts of Congress unconstitutional we would soon have a country without a constitution and without laws. The justice was right. No such power may safely be exercised by jurors. The author, following his previous course of reasoning, thinks that jurors should have the good sense to follow the direction of the judge in his finding of both law and fact, leaning hard upon him in his interpretation of law, yet neither in one nor the other are they to adjure their independent responsibility to society and to their own consciences. The presence on the jury of men of pronounced individuality would do no harm if a unanimous verdict were no longer required.

3. *Consideration of the Functions of Judges Continued*

We have seen that juries are a check upon the arbitrary power of judges in determination of both law and fact, and that judges are likewise a check upon juries in the determination of both fact and law,[21] but the chief responsibility is upon the judges to sustain the majesty of the law and the chief reliance of the people is upon the judges to give them justice. An article, recently published in the Journal of the American Judicature Society, must be quoted to sustain this position as to the power of judges: "Granting the judge to be all that a judge should be, it would seem that an expression of his opinion on the facts should enable the jury to decide better the issues which are otherwise presented from two very partisan viewpoints. Without such advice and comment the jury is deprived of the opinion of the only impartial expert present. Under the prevailing practise, jury trial very often degenerates into a mere game between the lawyers, and the essential function of the court is lost sight of." [22] The article shows that English judges, the United States federal judges, and the judges of Connecticut and some other states exercise this power. It may be added that in France the judge really conducts the trial and questions the witnesses, and the opposing counsel do little more than address the jury from their opposite points of view.[23]

How did the prevailing practise in America originate? No doubt the people of the colonies distrusted the judges when the appointees of a foreign and growingly disliked power. This distrust was the greater after the Revolution when judges were frequently unduly partisan and quite ignorant of law. The animosity between an ignorant bench and a learned bar came to a head in North Carolina, and resulted in the passage of a law in 1796 that, "Judges are forbidden in the charge to the jury to express any opinion as to whether a fact was fully or sufficiently proved . . . such matter being the true office and province of the jury."[24] The curtailment of the power of judges spread to Tennessee, settled by people from North Carolina, and then to other states. Gen. Benjamin F. Butler, master of wiles, piqued at contests with judges, succeeded, as a member of the legislature, in bringing the change to Massachusetts. Able criminal lawyers of South Carolina succeeded or all but succeeded in their design "to prevent verdicts of guilty in criminal cases" in that state. It was supposed to be a democratic reform, but it was a blow to real democracy and a return to chance and chicane.

Another reform, tending to exalt the judges to their proper station, is to give them a limited legislative power where they are the most interested in the perfection of their processes and the most competent to act. Reference is made to the widely approved grant to the judges of power to make their own uniform rules of procedure, acting through a judicial council or convention, a court or committee. Legislatures are quite unfit to enact codes upon such matters of detail, and yet they have done so, and the result is universal criticism of the slowness and uncertainty of judicial machinery.[25] When statutes conferring this rule-making power are passed, and the statutes are sustained by the courts of last resort, there is hearty acclaim by leaders of opinion throughout the country. Bar associations and societies like the American Judicature Society are sponsors of such reforms.[26] Legislatures, however, may not be expected to look favorably upon such extension of power unless the judges themselves become more modest in the enlargement of their powers in fields, according to world experience, not appropriate to them.

It is the function of judges to interpret the law, although in a democracy this function is not given to them alone, and they are not the ultimate authority. It is their function to interpret the common law, based on the primitive customs of the English people. It is the function of judges to interpret written documents. It was this recognized function that put such great power into the hands of judges formerly in libel cases.[27] Statutes are written documents, the words of which require definition and limitation. Even if written by skilled draftsmen cases will arise in which trained lawyers will not agree as to their meaning. But often statutes are not skillfully drawn. Their meaning is uncertain. Then it falls to the judges to interpret them. When the Sherman Anti-Trust Act was reported in the House of Representatives the objection was made that the terms were uncertain, but the chairman of the committee asserted that it would be left to the courts to determine just what contracts were in restraint of trade.[28] Constitutions are purposely left broad and general in expression so that they may not require frequent amendment. Yet they are written documents which sometimes the courts may be called upon to expound.

Not only does interpretation include definition and limitation, it also includes change and expansion. The Roman lawyers out of the meager formulas of the Twelve Tables evolved a whole system of private law. They did it by the application of logic and analogy; they did it by interpretation. So the common law of Pennsylvania is almost entirely judge-made law. It is a living, growing law. The same thing happens to statutes. When the intent of an act is clear, sometimes the courts will apply it to cases which do not literally come within the wording of the act. This is called giving effect to " the equity of the statute." [29] Constitutions also grow by interpretation. Thus Marshall applied the contract clause of the federal constitution to charters granted by state legislatures.[30] We may severely criticize this particular exercise of judicial interpretation as we may upon occasion criticize legislative or executive interpretations, but we must recognize that constitutions grow by interpretation. It is necessary and inevitable that law in all its forms be interpreted, and interpretation is a function of judges.

4. *The Judiciary as a Check on the Legislature*

French political philosophers [31] thought that they found in England an ideal balance between three independent departments, the legislative, executive, and judicial. The American fathers in framing their institutions sought to embody their English experience and this French theory. These departments were made relatively independent and each was to act as a check on the others. The legislature is checked by the people through frequent elections, by the executive through the veto, and by the courts through their power to interpret the laws. The judge applies the law to the individual citizen.

In applying the law he must choose between suggested constructions of the law. Suppose one interpretation of the statute makes it reasonable, another, unreasonable; one, just, and another, unjust; one, constitutional, and another in his view, unconstitutional; one, in accordance with inherited principles, and the other, not so. It is his duty to read into the law the most favorable construction. Perhaps the construction which the court adopts is according to the prevailing public opinion; yet the legislature may have intended something very different. For instance, the Supreme Court in reaching its decision in the Slaughter House cases interpreted the first section of the 14th Amendment to mean something very different from the intention of Congress.[32] The courts occasionally correct extravagant legislation. For instance, Louisiana, for the purpose of promoting the building of railroads, exempted the Vicksburg Railroad from taxation " for ten years after the completion of said road."

The road paid no taxes and many years passed without its completion. It was suspected that it would never be completed and so never pay taxes. Then the courts came to the relief of the state, and strictly interpreted the law in favor of the people. The words " for ten years after completion " were construed as meaning that the road was to be free of taxation for a period of ten years beginning with the completion of the road.[33]

This power in judges to interpret laws, existing everywhere throughout the world, gives them a very real check upon legislatures. The principles of the unwritten constitution of England guide Parliament in the enactment of laws and the courts in their interpretation. Judges there have an effective check on Parliament, which the American student may not always perceive, as our constitutions are written. Most European countries have written constitutions which guide legislators and judges. So likewise our constitutions, our fundamental laws, always have given and always must give to the courts a very considerable check on the legislatures, even though the courts were never to amplify their powers beyond their proper limits.

5. *Judicial Supremacy not a Necessary Deduction from the Power to Interpret*

Though judges are interpreters of the law, and the judiciary is a check on the legislature, and the constitution is fundamental law, it does not follow that federal courts ought to declare laws of Congress unconstitutional, for this would make the Supreme Court not a coordinate body with Congress, but a superior body, not an equal power but a higher power, a supervising legislative body declaring the will of the nation as expressed by Congress to be null and void.[34] By Congress we mean, of course, Congress and the president normally acting together as the political departments of the government. The policy-forming organ of the people in this government is therefore Congress, not the Supreme Court. The high repository of discretion is Congress, not the courts. It falls to Congress, not the courts, to decide the great questions of sovereignty, such as peace and war.

A properly organized government does not make the law-interpreting department supreme over the law-making department.[35] We inherited our general system of government from England. Judges there may not declare laws of Parliament null and void.[36] It may be answered that we have a written constitution. So has nearly every country in the world — all borrowing from us, for written constitutions originated here. But it is most exceptional when any constitution borrows from us judicial supremacy, or creates even a special court to exercise some slight degree of judicial review.[37] Countries like Switzerland which have imitated our federal system are careful to prohibit any such power as our courts have assumed.[38]

Furthermore there is no clear grant of judicial supremacy in the federal constitution. It does not say that a federal court has the right to declare an act of Congress void.[39] Neither was there any similar grant in the original state constitutions. Not one of them gave a state court the right to declare an act of the state legislature null and void on the pretence that it violated the state constitution.[40] Upon this point a quotation must be made from the greatest lawyer of his time when he was at the full maturity of his powers. These are the exact words: "The judicial authority can have no right to question the validity of a law, unless such jurisdiction is expressly given by the constitution."[41] That lawyer was John Marshall arguing against the doctrine of judicial review in the case of Ware v. Hylton before Mr. Justice Iredell. This was no hastily spoken word that escaped from the lips of the great lawyer, for the justice in his opinion referred to the "depth of investigation" and the "power of reasoning" equal to anything he had ever witnessed, and "a splendor of eloquence" surpassing what he had ever felt before.

It is true that judges must interpret laws and constitutions, but they are not alone in the possession of this right. Congress cannot pass an act without interpreting its powers under the constitution.[42] When Congress has exercised its right and duty of interpreting the constitution by passing an act, and the president has given his assent, it ought not to be in the power of a third body, merely a coordinate body, to declare the act of Congress and the president unconstitutional. The court should hold itself bound by the previous act of a coordinate body.[43] If a member of Congress misinterprets the constitution, the people within two years may refuse to reelect him. If a justice misinterprets the constitution, he is irremovable. In so-called political cases the federal courts do not pretend to overrule the action of Congress and the president. According to Chief Justice Gibson, the greatest jurist that Pennsylvania has produced, it is a political question, and not for the courts to decide, whether or not a state law violates the state constitution and whether or not a federal law violates the federal constitution.[44]

This assumption of legislative power by the courts detracts from the dignity of both national and state legislatures. Indeed state legislatures suffer the greater loss of dignity from this cause. The people lose the sense of responsibility in the choice of members, and the members lose the sense of responsibility in the character of their legislation. Besides, when a law has been enacted, the people do not know sometimes for years whether the courts will sustain it or not. The uncertainty is ruinous to the efficient enforcement of law, and this uncertainty of what the law is must be harmful to business.

6. *The Rise of the American Doctrine*

How is it that a practice which the rest of the enlightened world rejects, is called the American doctrine of judicial review? Our colonial history gives us the beginning of the explanation. After a long period of salutary neglect Parliament began to legislate for the colonies. Parliament passed a law sanctioning general search warrants. In 1761 James Otis maintained that the courts could refuse to enforce the law as against reason and the constitution.[45] He quoted some dicta of Lord Coke to this effect. The bold argument of Otis made a stir, and marked the introduction of the doctrine. Men began to talk of the possibility of meeting the encroachments of Parliament in this way. The colonial courts, of course, did not act as proposed. Many of the revolutionary state legislatures, as was natural in a time of upheaval, passed laws which were unwise stretches of their power, or radically experimental, or detrimental to business interests. The more conservative classes began to look to the courts as their protectors. Then the lawyers began to urge the state courts to nullify laws which they thought unconstitutional. Timidly and slowly the state courts began to exercise a power which tended toward judicial review. In New Jersey there was the one clear case of a court declaring unconstitutional a statute which had been regularly passed. The legislature had created juries of six, for certain kinds of cases, and a court, not the court of last resort, declared the law invalid. It was a mistake and the mother of mistakes.[46]

When the federal constitutional convention assembled in 1787 one of the puzzling questions was how to keep the states from violating federal legislation. A favorite plan was to give Congress power to pass on state legislation, but this was rejected. A simpler plan was adopted. Both federal and state courts were given the power to declare state laws invalid which violated the supreme law of the land. This was a happy solution of a difficult problem, and yet it was the adaptation of a familiar device. In England the courts had the right and have it now of declaring ultra vires the ordinances of subordinate rule-making bodies. Our state courts had a similar power over the ordinances of administrative bodies. When our state legislatures violate the national constitution, laws, or treaties, they are in the position of subordinate rule-making bodies, and the courts may very properly be given the power to decide whether they are, or are not, exceeding their powers. But when a state legislature is claimed to violate the state constitution, it is not then in the position of a subordinate rule-making body. And when Congress is claimed to violate the federal constitution, it is not at all in the subordinate position of a city council or a village board of trustees.[47] Yet the new constitution did give the power to declare unconstitutional certain so-called laws, and so it was easy, for good judges, as the maxim goes, to amplify their powers beyond all reason.

7. *The Decision in the Case of Marbury v. Madison and the Rising Protest*

After the new central government was set up the lower federal courts asserted their independence by refusing to administer the pension law. One of these cases went up to the Supreme Court, but there was no opinion read and the case was not till years later even mentioned in the printed reports.[48] The assertion of power to nullify statutes by state and federal courts was much resented by injured parties and their friends. Frequently there was violent opposition to this assumption of a dangerous power. There were harsh words and resolutions in legislative bodies, and threats of impeachment. Outside there were protesting mobs. Great legal minds were outspoken against the evil, but the case that fastened the practise on the country was Marbury v. Madison,[49] decided in 1803.

The compelling logic [50] of the great opinion of Chief Justice Marshall has been admired universally. He grandly asserts that "a legislative act contrary to the constitution is not law." But the critic might ask, Would not a decision of the Supreme Court contrary to the constitution have the force of law till reversed by the court? If so, why would not a congressional act contrary to the constitution have the force of law till repealed by Congress? Between the stately lines of the Marbury decision one does not at first suspect the bitter personal attack upon the new president, Jefferson, in what was really a violently partisan opinion.[51] To effect this purpose the merits of the case were considered first and the jurisdiction last. This was a departure from the usual order in writing opinions. It has been pointed out by a great legal light that the law was misinterpreted that it might be declared unconstitutional.[52] Another shows that the constitution itself was misinterpreted that another possible view of the law might not be entertained.[53] At least that was the result, no matter what the purpose. Comparison with later cases reveals that Marbury had no vested right in his commission.[54] So from five points of view the opinion was at fault, and yet its compelling logic is said to remain unassailable.

The Supreme Court of the United States declared a law of Congress unconstitutional for the first time in 1803, barring a doubtful earlier case, and not again till the Dred Scott case, so justly criticized by President Lincoln, just before the Civil War.[55] Since the Civil Rights decision there have been unfortunately many laws of Congress invalidated.[56] In exercising a very necessary power of reviewing state laws claimed to violate federal law, the same court has invalidated a great number,[57] and among decisions of this class there have been lamentable mistakes. Yet the Supreme Court justices are often men of liberal, popular sympathies — not only great lawyers but statesmen. The chief criticism of judicial review is directed against state courts, notably in certain states where modern social legislation has been condemned by the judicial application of a discredited theory of government, and not by the actual provisions of the state constitutions concerned.[58]

The result of this enlarged judicial activity, for there have been hundreds of recent cases, especially under the due process clauses of federal and state constitutions, is that there has arisen a strong cry of protest.

Of the remedies suggested to meet the evil, one was the proposition for the recall of decisions, made by President Roosevelt. Colorado alone adopted it, but in such a distorted form that the state supreme court rightly declared the amendment in violation of the federal constitution.[59] A more widely adopted remedy is the recall of judges, but this is more objectionable than the recall of decisions, at least from the point of view of political science.[60] The Ohio convention after hearing the proposition of President Roosevelt adopted a remedy of its own, that of substantial unanimity, meaning that only a unanimous court or one substantially unanimous may declare a law unconstitutional as violating the state constitution.[61] Other states are adopting this successful measure for cutting down an abuse. A better remedy would be to copy the Swiss [62] provision and prohibit the evil entirely, but, of course, retaining the necessary and legitimate exercise of judicial review as repeatedly explained.[63] Probably a diseased condition, become chronic, may be most safely cured by the slow return to correct practise, accompanied by improved legislative procedure and by an enlightened public opinion.

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[1] Pound, R., *The Spirit of the Common Law,* pp. 123 ff.

[2] Duane, R., "Civil Jury should be Abolished," in *Journal of the American Judicature Society,* Vol. XII, No. 5, p. 137.

[3] Coudert, F. R., *Certainty and Justice,* p. 115.

[4] Callender, C. N., *American Courts,* p. 232: "It interposes an additional obstacle to be overcome by the prosecution, and for no good reason."

[5] Hamilton, Alexander, *The Federalist,* edited by H. C. Lodge, p. 531: "The security of liberty is materially concerned only in the trial by jury in criminal cases."

[6] Locke, John, in the "Fundamental Constitutions" (LXIX), provided for majority verdicts. (Macdonald, W., *Select Charters,* p. 161.)

[7] Schofield, H., *Essays on Constitutional Law and Equity,* Vol. I, p. 252, quoting opinion in Slocum v. N. Y. Life Insurance Co., 228 U. S. 364.

[8] *Ibid.,* Vol. I, p. 306.

[9] Holmes, O. W., *The Common Law,* pp. 262, 263.

[10] Schofield, H., *op. cit.,* Vol. I, p. 314.

[11] *Ibid.,* Vol. I, p. 318.

[12] *Ibid.,* Vol. I, p. 316.

[13] *Ibid.,* Vol. I, pp. 306, 307.

[14] Dillon, J. F., *The Laws and Jurisprudence of England and America,* p. 130.

[15] Geeting, J. F., "Criminal Procedure" in *American Law and Procedure,* pp. 262–265. Andrews, J. D., *American Law,* Vol. III, p. 1483.

[16] *American Year Book* for 1915, p. 278. Frank v. Mangum, 35 Sup. Ct. Repts. 582.

[17] Hamilton, Andrew, in *World's Best Orations,* Vol. VI, p. 2377.

[18] *Albany Journal*, May 19, 1915. *Public Ledger*, Phila., May 23, 1915.

[19] N. Y. Commission of 1915, *Index Digest of State Constitutions*. Constitutions of Ind., La., and Ore. give juries power to determine law and fact in criminal cases. The laws of other states have made similar provisions, as Ga. and Va.

[20] Baldwin, S. E., *The American Judiciary*, p. 190.

[21] Schofield, H., *op. cit.*, p. 306.

[22] Johnson, K. M., in *Journal of the American Judicature Society*, Vol. XII, No. 3, p. 76.

[23] Coudert, F. R., *op. cit.*, pp. 119 ff.

[24] Johnson, K. M., *op. cit.*, p. 78.

[25] Marvel, J., "The Rule-Making Power of the Courts," *Journal of the American Jurdicature Society*, Vol. XII, No. 2, pp. 55 ff. Callender, C. N., *op. cit.*, pp. 229 ff.

[26] *Journal of the American Judicature Society*, Vol. XII, No. 3, p. 70.

[27] Baldwin, S. E., *op. cit.*, pp. 188 ff.

[28] *Ibid.*, pp. 96 ff.

[29] *Ibid.*, p. 84.

[30] Dartmouth College v. Woodward, 4 Wheat 518.

[31] Montesquieu, Baron de, *The Spirit of the Laws*, Vol. I, pp. 151 ff. (Book XI:6).

[32] Slaughter House Cases, 16 Wall. 36 (1873).

[33] Vicksburg R. R. Co. v. Dennis, 116 U. S. 665 (1886); Thayer's *Cases*, p. 1678.

[34] Thayer, J. B., "Origin and Scope of the American Doctrine of Constitutional Law," in his *Cases on Constitutional Law*, Vol. I, pp. 149 ff.

[35] Many Christians believe the Bible to be the authoritative word of God, and yet hold to the right of private interpretation of the Bible. They do not thereby make themselves as interpreters superior to God whom they regard as the lawgiver.

[36] Dicey, A. V., *Law of the Constitution*, p. xviii.

[37] McBain, H. L., and Rogers, L., *The New Constitutions of Europe*, pp. 307 ff. Coxe, B., *Judicial Power and Unconstitutional Legislation*, pp. 95–102. The German principle of interpretation is: "The constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret." Blachly, F. F., and Oatman, M. E., in *Political Science Review*, Vol. XXI, p. 119, say: "The German constitution is silent on the right of the courts to declare national legislative acts invalid." Yet Nov. 24, 1925, the Reichsgericht decided "that the courts are competent to inquire into the constitutionality of national laws." The law involved was upheld.

[38] Brooks, R. C., *Government and Politics of Switzerland*, p. 166.

[39] McBain, H. L., *The Living Constitution*, p. 238. Corwin, E. S., *The Doctrine of Judicial Review*, p. 10.

[40] Thayer, J. B., *Cases on Constitutional Law*, Vol. I, p. 149. Chief Jus-

tice Gibson in Eakin v. Raub, 12 S and R 330 (1825), (see Thayer's *Cases*, p. 135).

[41] Muller, W. H., *Early History of the Federal Supreme Court*, pp. 73 ff. Ware v. Hylton, 3 Dal. 199 (1795).

[42] Thayer, J. B., *op. cit.*, Vol. I, p. 152.

[43] Thayer, J. B., *op. cit.*, Vol. I, p. 138, quoting from Chief Justice Gibson: "The legislature is entitled to all the deference that is due to the judiciary; that its acts are in no case to be treated as *ipso facto* void." Corwin, E. S., *The Doctrine of Judicial Review*, p. 58, quoting Breckenridge of Ky. who advocated the exclusive right of the legislature "to interpret the constitution in what regards the law-making power" and the obligation of the judges "to execute what laws they make."

[44] Gibson, Chief Justice, in Eakin v. Raub, 12 S and R 330 (1825).

[45] Haines, C. G., *The American Doctrine of Judicial Supremacy*, p. 52.

[46] *Ibid.*, pp. 80 ff., on Holmes v. Walton (1780). Baldwin, S. E., *op. cit.*, p. 100.

[47] Beard, C. A., *The Supreme Court and the Constitution*, p. 33, quoting Madison who said in the first Congress: "I beg to know upon what principle it can be contended that any one department draws from the constitution greater powers than another in marking out the limits of the powers of the several departments." Again he says: "This makes the judiciary department paramount in fact to the legislature, which was never intended and can never be proper."

[48] United States v. Yale Todd (1794), Haines C. G., *op. cit.*, p. 159.

[49] I Cranch 137.

[50] Thayer, J. B., *op. cit.*, Vol. I, p. 133, quoting Chief Justice Gibson on the opinion of Marshall: "If the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempted to defend."

[51] Corwin, E. S., *op. cit.*, p. 9. He says, "This decision bears many of the earmarks of a deliberate partisan coup." Baldwin, S. E., *op. cit.*, p. 101.

[52] Corwin, E. S., *op. cit.*, pp. 7–9.

[53] Ibid., pp. 4–7. Freund, E., *Standards of American Legislation*, pp. 276 ff.

[54] Parsons v. United States, 167 U. S. 324. Willoughby, W. W., *On the Constitution*, Vol. II, p. 1183.

[55] 19 How. 393. Corwin, E. S., *op. cit.*, p. 141.

[56] McBain, H. L., *The Living Constitution*, p. 244, saying there were 53 cases in 1927 from 1803.

[57] *Ibid.*, saying there were about 250 in 1927 from the beginning.

[58] Haines, C. G., *op. cit.*, pp. 328 ff. Baldwin, S. E., *op. cit.*, p. 107, saying there were 50 in one year. Davis, H. A., *The Judicial Veto*, who finds that in the state of New York 780 laws had been sustained and 285 overruled up to 1914, or 27 per cent.

[59] Haines, C. G., *op. cit.*, p. 342. Ransom, W. L., *Majority Rule and the Judiciary* (a defense of this remedy).

[60] Haines, C. G., *op. cit.*, p. 341.

[61] *Ibid.*, p. 345. McBain, H. L., *op. cit.*, pp. 261 ff.

[62] Vincent, J. M., *Government in Switzerland*, p. 207.

[63] Namely, the powers inherited from English precedent that courts may declare *ultra vires* ordinances of subordinate rule-making bodies. Also the application of this principle to state acts which conflict with the federal constitution, laws, or treaties.

CHAPTER XXI

SUNDRY FEDERAL RIGHTS IN FURTHERANCE OF JUSTICE

Review of Justice through Judges Learned in the Law

We have seen that the arbitrary power of jurors is checked by judges and that the arbitrary power of judges is checked by jurors. Persons acquainted with the unreliability of juries will agree with the author in the advocacy of an extension of the power of the judge in the finding of fact, but not so many would consent to an extension of the power of the jury in the finding of law, even under the direction of the judge, yet this is the legal practise of a number of states and the actual practise of many others. Perhaps there should be recourse to something like the old juries of attaint,[1] employed to punish jurors who violated their oaths. No doubt opinion would approach unanimity in support of a rule-making power in judges, and of every proposition for the enlargement of judicial authority and the enhancement of the honor justly due our judges. But when the author criticized the great American doctrine of judicial review the majority of thoughtful readers would register dissent. Students of American government, nevertheless, should know what the world doctrine, conceived of as the scientific doctrine, is, and what are some of the arguments, from the point of view of world jurisprudence, against the American doctrine. Great lawyers who have been most active and successful in attacking the laws which in other advanced nations are approved, criticize the courts roundly for the inconsistency of their decisions and for not invalidating more laws. Humanitarians, on the other hand, criticize the courts for reactionary decisions, based on economic theories no longer held by enlightened peoples, but they do not question that the power of veto rightfully exists in the courts. Yet great jurists, like Chief Justice Gibson[2] of Pennsylvania, and Chief Justice Clark[3] of North Carolina, great teachers of law, like Dean Thayer[4] of Harvard Law School and Dean Trickett[5] of Dickinson Law School, great statesmen, like Madison[6] who was more than any other person the father of the constitution, and Roosevelt[7] who thundered against anti-social decisions, and notable leaders in both houses of Congress in recent years, are ranged on the side of the world doctrine. A political scientist who follows in their train is led not by numbers or names but to an inevitable conclusion by the application of settled law to verified facts. Fear of democracy begat the American doctrine. But liberty and property are safest where there is a wide distribution of wealth among an industrious and thrifty people, and a wide participation in government by a moral and intelligent electorate. Faith in democracy, with a progressive correction of legislative methods, will restore to the political departments their rightful powers, and establish the judiciary, not in its assumed supremacy, but in an honored coordinancy.

I. Sundry Procedural Rights

1. *Provision Against Unreasonable Searches and Seizures*

The indignation of James Otis in 1761 against the invasion of constitutional rights of the people by the imposition of general warrants, known as writs of assistance, was somewhat qualified by the fact that resort to these writs was made necessary by the general resistance to the customs laws.[8] Shortly after this agitation in Boston there was a similar indignation in London against the invasion of private homes and private papers by a general search warrant which brought the arrest of John Wilkes, secret editor of a scurrilous paper, the North Briton. In his trial in 1765 the warrant and its execution were held by Lord Camden to be totally subversive of the liberty of the subject. Wilkes, personally unworthy but representing the demand for privacy in the houses, papers, and personal possessions of the people, became a hero on both sides of the Atlantic.[9] The Fourth Amendment of the federal constitution grew out of these two recent contests. It reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Its meaning is plain that the people have a right to as great a degree of privacy in their homes, papers, and intimate personal possessions as is consistent with the welfare of society. It cannot mean that no arrests and seizures are to be made without warrant, for the necessity of such acts has always been recognized, but evidently the necessity must be clear. As in the case of rights previously considered this right must not be so interpreted as to defeat the ends of justice and the enforcement of law. At the same time under the pretense of law enforcement there must not be unnecessary invasion of the privacy of the people. There is a vast amount of federal legislation on the subject, arising in connection with the customs, internal revenue, Indian service, counterfeit laws, the Harrison Narcotic Act, and now the Volstead Act. Every state but New York has similar constitutional provisions.[10]

The divergencies of interpretation do not arise from actual differences in the law. In Pennsylvania "if an officer believes from his own observation or from information or from sources so reliable that a prudent person, having due regard to the rights of others, would act thereon, and has reasonable and probable cause to believe that law is being violated in his presence, he may arrest without a warrant." [11] In a Maryland case it was held that a sniff was as good as a warrant and that an officer was therefore justified in entering and seizing utensils.[12] In a Montana case a sheriff encountered the defendant carrying a handbag from which protruded a demi-john containing liquor, and arrested him. This arrest and seizure were held to be legal.[13] In a New York case the facts were almost identical, only it was a bottle sticking out from the defendant's pocket, and in this case the court held that there was an unlawful invasion of personal liberty, since the bottle might have been empty.[14] In a Wisconsin case a still more ludicrous situation developed; the officer entered a soft-drink establishment with a warrant for the premises and not for the person. The defendant made a quick motion to his pocket whereupon he was searched and liquor found. The court held that this was a search without warrant in violation of the constitution and perhaps of Magna Charta as well.[15] In the dissenting opinion of a Michigan case the justice declaimed against uncontrolled espionage and police visitation, and asserted that the search of an automobile without a warrant was illegal. But in the famous case of Carroll v. United States[16] it was decided by the Supreme Court through Chief Justice Taft that search without warrant of an automobile engaged in the illegal transportation of intoxicating liquor is not prohibited by the 4th Amendment. In this case there was probable cause since the officers had reason to believe that the automobile carried liquor liable to seizure and destruction. Mr. Justice McReynolds in his dissenting opinion asked, "Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit?" Declamation upon the sacredness of constitutional rights is often a smoke screen for defiance of the constitution and the law.

The greatest divergence between federal interpretation of the 4th Amendment and the usual state interpretation of similar provisions of state constitutions, turns on the admission of evidence illegally obtained. Suppose officers stop an automobile, seize liquor, and arrest the persons in charge, and the court decides that the officers, when they made the search, did not have legal knowledge of the violation of law, and so the evidence was illegally obtained. May evidence, so obtained, be used against the defendants? "The constitutional provision was directed primarily at the general warrant as an instrument of oppression. There is no basis for the contention that evidence obtained in the course of illegal searches and seizures is inadmissible, since the Fourth Amendment makes no reference to the admissibility of evidence. Such evidence was freely admitted in England, and in America before and after the constitution was framed. For nearly one century after the adoption of the federal constitution, courts held, as had been the common law before, that the admissibility of evidence was not affected by the means employed in obtaining it. Then in 1885 came the decision of Boyd v. United States,[17] which overturned the rule and gave a new interpretation to the search and seizure clause of the United States constitution. This decision is regarded as having been poorly deduced, in that it influenced subsequent decisions on a principle that was generally accepted and never doubted."[18] Thus the United States Supreme Court in the case of Marron v. United States[19] reaches a curious decision. It is that the 4th Amendment prevents the seizure of ledgers and bills not described in the warrant, and the 5th Amendment prevents the use of evidence so obtained. Nevertheless the officers may arrest the person found in charge of the place and actually engaged in a conspiracy in violation of the law, and in arresting him they may seize the ledgers and bills used by him to commit the offense. Thus Marron who was brought into the case by the evidence of the ledgers and bills must have been delighted to find that the 4th Amendment protected him from the seizure of his papers and the 5th Amendment from their use as evidence against him, but he must have been sorely distressed to learn that the incidental seizure of his papers in connection with the arrest of his co-conspirator, found committing crime, made it legal to use this same evidence against him (Marron) and to send him to prison. But suppose the person in charge had fled to the roof and escaped, the evidence against the several conspirators could not have been used against them. In the more recent case of Olmstead v. United States,[20] the wire-tapping case, Mr. Justice Brandeis and other dissenting members of the court desired to apply the principle of this line of federal cases for the protection of the liquor ring at Seattle whose crimes were fastened upon them by the tapping of telephone wires, but Chief Justice Taft held that the mere tapping of telephone wires, off the premises of the accused, was not in violation of the 4th Amendment and that at common law the admissibility of evidence is not affected by the illegality of the means by which it is obtained.

For the sake of consistency and in aid of law enforcement the federal courts might well return to the interpretation, formerly given to the 4th Amendment and now given by most states to their own search and seizure provisions. "The state rule, which is that courts are not bound to inquire as to the means by which the evidence was obtained, as long as it is competent and pertinent, is based on the theory that the illegal search and the use of the evidence obtained as a result, are two separate transactions and are not to be associated. . . . It is said that the law is not solicitous to aid suspected criminals to conceal the evidence of their iniquity, and that the whole system of espionage rests largely upon deceiving or trapping the wrongdoer into some involuntary disclosure of his guilt."[21] Says a state judge: "Courts do not impose an indirect penalty upon competent evidence because of illegality in obtaining it. An officer, if he acts outside of the scope of his authority in seizing tangible evidence, does not carry with him the support of the government, but incurs personal liability. . . . He may be brought to court to answer for his wrong either civilly or criminally, but his misconduct ought not to hamper the government in the enforcement of laws and the preservation of order."[22] The author believes in the enforcement of law and by the same means that the whole world finds necessary to employ. Therefore he would say that suspicion as well as knowledge is "probable cause," and that unearthing a crime is proof that the officer had "probable cause," but if he is mistaken and disturbs the privacy of innocent persons, let him pay ample damages and the government indemnify him, if he acted in good faith, so that he will not lose his enthusiasm for law enforcement. As it is, officers frequently know who the guilty parties are in serious crimes in their city, but they have no legal evidence, and therefore may not search or seize, or even obtain a search warrant. The criminal continues to ply his trade. The 4th Amendment should be so interpreted that the criminal loses his right of privacy.

2. *Provision Against Being Made a Witness Against One's Self*

Blackstone remarks that it was to the honor of the English rulers and of the English law that no such proceeding as the rack was ever allowable by the laws of England.[23] There have been instances of extorted confessions in England, but they were in violation of the common law. Scotland, on the other hand, was a Roman law country and in conformity with that law permitted torture. This former continental procedure was said to arise from a tenderness for the lives of men so that no life should be taken on the evidence of a single witness. The actual English trial may not have been marred by torture, but when the consent to stand for trial was obtained by the so-called penance, early English procedure is found to have been no more humanitarian than the Roman. If the defendant claimed the benefit of clergy he was burned in the hand, but if he stood mute and so refused to plead, he was remanded to the prison, put in a low, dark chamber on his back, naked, and there was weighted down with iron heavier than he could bear, and he was given on alternate days three morsels of the worst bread or three draughts of stagnant water till he died. There were cases of this pressing to death where men, thus subjected to torment, lingered forty days. The purpose of this pressing was to compel the prisoner to plead so that upon conviction his lands would escheat to the king. The prisoner's purpose in refusing to plead was to save his lands for his heirs.[24] The provision of the common law that the accused should never be compelled to give evidence against himself, was a very crude contrivance to protect the accused from torture. In a humanitarian age the provision against self-incrimination is not the appropriate means to the end desired. Now the very existence of this legal right not to give evidence almost compels third degree methods to complete the evidence against criminals in the police investigations. The controversial procedure of a common law trial is antiquated and ought to be obsolete.[25] The inquisitorial procedure of the Roman law is natural, fair, and effective. No torture or third-degree methods are necessary, yet the accused must answer the questions put to him in the preliminary investigation and he is protected by the presence of his counsel. So too in the formal trial it is to his advantage to speak out and put as favorable a construction upon every fact in his case as may be possible. The modern Roman law procedure is so devised as to give a just enforcement of a substantive law which is also modern, humanitarian, and just. The antiquated common law procedure was so devised as to give undue advantage to the accused as compensation for the undue rigor of the former substantive law. Now the substantive law of England and the United States has been humanized and perhaps unduly softened, and yet the old procedural handicaps, besetting successful prosecution, are retained. It is too difficult to convict a criminal.

What is the remedy? Repeal that provision of the 5th Amendment which reads as follows: "Nor shall [any person] be compelled in any criminal case to be a witness against himself." There are similar provisions in all the state constitutions. These should be repealed first. As a step in that direction very many states provide that the accused has the right to be heard in his own behalf, and the Ohio constitution has made a very substantial advance in the direction of reform. It is that a person's failure in criminal cases to testify may be considered by the court and jury and made the subject of comment by counsel. It may be predicted that this Ohio reform will find wide acceptance, but, unfortunately, it may be that our constitutions will long retain their provisions against self-incrimination.[26]

3. *Provision Against Double Jeopardy*

The 5th Amendment provides that no person shall be subject for the same offense to be twice put in jeopardy of life and limb. The same act may constitute two distinct offenses. Thus the passing of counterfeit coin of the United States is an offense against the United States, and the fraud upon a citizen of the state is an offense against the state. Therefore conviction and punishment for the one offense is not a bar upon prosecution for the other. Again when a man commits assault and battery it is an offense against the peace of the state and may be also an offense against the peace of the city. The offender may be punished for both offenses, though there was but one act.[27]

By the common law not only was a second punishment for the same offense prohibited, but a second trial was forbidden. It is a rule of the United States Supreme Court that a person has been in jeopardy when he has been regularly charged with a crime before a tribunal properly organized and competent to try him; certainly this is so after his acquittal. When a jury has disagreed and been discharged by the judge, a plea of former jeopardy will not be held good. The prosecution has no right of appeal in a criminal case when there has been a verdict of acquittal. Thus one trial and one verdict must, as a general rule, protect the accused against any subsequent accusation of the same offense. But the accused upon conviction may appeal, and when a new trial has been ordered he waives his plea of former jeopardy and may be found guilty of an offense of a higher degree than that originally found against him.

Under the common law rule of double jeopardy does not the accused possess an unfair advantage against the prosecutor, representing society? In prosecutions under the Sherman Anti-Trust law, under the Volstead law, or under the laws protecting federal property, as in the recent oil cases, we have spectacles of astounding acquittals or, at least, failures to convict, when the weight of evidence against the accused was overwhelming. Ought not the prosecution as well as the defense to have the right of appeal? A reasonable protection against double jeopardy would remain, but its definition would be slightly modified by Congress in the interest of justice.

4. *Provision for a Speedy and Public Trial*

In the interest of the accused there is constitutional provision for speedy trial. The author knew of a case in Michigan where a promoter was brought from Oregon on a criminal charge and detained a whole year in jail. He came before the examining magistrate about sixty times. The delays were due in part to his own counsel but more frequently they were due to the prosecution. Evidently there was an effort to wear him out and force a settlement. It was a discreditable use of the public prosecution in aid of private interests. In criminal cases delays come more generally from too great leniency to the counsel for the accused. This is one of the crying evils of American procedure — interminable and costly delays.[28] Yet there is constitutional guaranty of speedy trial. In all parts of our country bar associations, judges, and legislators are devising reforms that the speedy trials of England and Germany may be reproduced here so far as consistent with justice.

It is also a constitutional right that trials be in public for the protection of the accused, that he may be assured fair dealing and be not unjustly condemned. Yet in the interest of public decency it is often necessary to require that the young be excluded and also morbid persons, as far as possible, who delight in the evidence of human depravity.[29]

5. *Provisions for Information of Nature of Accusation, and for Compulsory Process for Obtaining Witnesses*

The importance of these guaranties is evident but explanation of the second only is required. Since the United States has jurisdiction throughout all the states the guaranty of compulsory process may be fully observed, but as the states have no jurisdiction beyond their own borders they frequently have difficulty in obtaining witnesses against the accused and would have the same difficulty in obtaining witnesses in his behalf. But frequently neighboring states, by compact or custom, require their citizens when summoned by a local magistrate of another state to appear and testify before the court in such prosecution upon payment for their time and expenses. This resort appears to be in the interest of the prosecution alone. There ought to be a similar provision for the protection of the accused in state courts.[30]

6. *Provision for Assistance of Counsel*

It is a universal principle of our constitutions, federal and state, that the prisoner shall be allowed a defense by counsel. When he is unable to employ counsel the court may designate some member of the bar to defend him at the expense of the government. Even if no provision is made for payment at public expense it is nevertheless the duty of the designated counsel to give the accused unstinted service. No member of the bar may decline appointment. After engagement counsel may not withdraw from the case without the consent of his client and of the court. Every criminal is entitled to be judged by the laws, and to this end the counsel must see that there is no conviction contrary to law. Yet the counsel must not give service inconsistent with his obligations to the court and to society. The main objective of one of the popular reforms of our day is to secure ample and competent legal aid to persons charged with crime and unable to secure such aid, by the creation of the new office of Public Defender.[31] In Mexico the impecunious defendant may select any member of the bar who practises in criminal cases and the government pays for the defense.

II. LIMITATIONS ON THE JUDICIARY FOR THE PROTECTION OF THE PEOPLE

1. *Provision Against Excessive Bail*

The English are not so lenient as are the Americans in the matter of bail. Says Baldwin: "The essence of bail is that the prisoner shall enter into an obligation, together with . . . others of pecuniary responsibility as his sureties, to appear whenever he may be called for in the course of the pending proceeding, on pain of forfeiting a certain sum of money." In fixing the amount discretion may be exercised according to the gravity of the offense and the means of the defendant.[32]

2. *Provision Against Excessive Fines*

A difficulty sometimes arises in the imposition of fines to distinguish a series of acts constituting one offense from a series in which each act is a separate offense. A man was convicted of the violation of a city ordinance on 72 charges. He had destroyed that number of plants in less time than two hours. There was a fine of 10 dollars or 30 days in jail for each plant destroyed, making a total of $720 or six years in jail. On appeal the fine was declared excessive as the offenses were continuous, not really separate. But when a Vermont liquor dealer within three years shipped out 307 consignments of liquor in violation of the prohibition law, he was fined $20 or one month in jail for each consignment, making a total of $6,000 or more than 25 years. This fine was upheld as not excessive as each violation was a separate offense.[33]

3. *Provision Against Cruel and Unusual Punishment*

Where the whipping-post and the pillory have never been established or have long since been banished Cooley thinks they would be regarded as cruel and certainly unusual.[34] Yet mere novelty does not condemn a method unless it is also cruel.[35] Execution of the death penalty by electrocution was contested but was held to be not cruel in the constitutional sense.

A statute for the sterilization of criminals was held to be constitutional in the state of Washington in 1912,[36] but a similar law of New Jersey was held to be unconstitutional in 1913.[37] Some sixteen states or more have passed laws for the sterilization of criminals or defectives or both.[38] Four states passed such laws in the year 1925.[39] In Washington where the law is frankly punitive and not enacted as a health measure there has been an energetic attempt to enforce the law. California reports many operations on the insane and Wisconsin reports a number on the feebleminded. There is a division of opinion among men of science as to the value of this method of fighting crime.[40] The United States Supreme Court has given it legal approval.[41]

4. *Impeachment by Two-thirds of Senators Present*

The last three provisions are limitations on the courts, enforced by the courts, and they are also limitations on the legislatures, enforced not by the legislatures on themselves but by the courts through their assumed power of judicial review. Impeachment is a judicial power conferred by the constitution upon the legislature. The House of Representatives acts as the grand inquest or grand jury, impeaching officers of the government, and the Senate acts as the high court of impeachment or trial jury, though the Senate insists that it sits not as a court but still is the Senate. Yet this function is not altogether judicial; it is partly political in its nature.

When judges become determiners of policy, declaring laws unconstitutional, they are assuming the functions of the political organs of government, and they make themselves liable to political attack. Yet a political attack upon judges through impeachment is a most unsatisfactory method of removal, since it is almost impossible to obtain a two-thirds majority of the senators present. Senators who resent the encroachments of the judiciary, can seldom bring themselves to charge a judge with high crimes and misdemeanors because of such encroachments. According to Cooley there had been up to his time at least two such cases, impeachment "as criminals for refusing to enforce unconstitutional enactments," as he puts it.[42] He cites the impeachment in effect of the Rhode Island judges in 1786, for refusing to enforce a legal tender law passed by the legislature. The legislature refused to reelect them when their terms expired at the end of the year, and "more pliant tools" were chosen by whose assistance the paper money was forced into circulation. In 1808 two judges of Ohio were impeached for declaring a law unconstitutional under both the federal and state constitutions, but the trials resulted in acquittal.

In 1926 the Senate of the United States sat as a high court of impeachment for the tenth time, but there have been of these ten trials only four convictions or the equivalent of the same, and these four removed from office have been judges.[43] Though other federal judges are now threatened with impeachment, the number of removals of judges from 1789 to 1929 is so small as to be quite negligible. Though the terms of state judges are generally for years and not for life, and there are in 21 states other methods of removal of judges than conviction on impeachment, yet it has been said "that impeachment and legislative removal do not work, and that unfit judges have remained on the bench because no other modes of removal were available." [44]

But if impeachment does not work, it may be said with all assurance that good judges are not made by checks upon their strictly judicial functions in the hands of political departments, and are not made by impeachment, or legislative removal or recall of judges, but good judges are made by good appointments and then by independence secured by permanence of tenure and by assurance of undiminished salary; good judges are made by minds that are clear, steady, and clean, by the hearty support of an upright bar, and by a public opinion that is informed, critical, and fair. A lesson to be learned by everybody is on cooperation; a lesson to be unlearned by everybody is on encroachment and obstruction.

[1] Cooley's *Blackstone*, Book III, p. 402.

[2] Thayer, J. B., *Cases on Constitutional Law*, Vol. I, p. 133, Eakin v. Raub (1825).

[3] Haines, C, G., *The American Doctrine of Judicial Supremacy*, pp. 143, 336–338.

[4] Thayer, J. B., *op. cit.*, Vol. I, p. 149, extract from his essay on "Origin and Scope of the American Doctrine of Constitutional Law."

[5] Haines, C. G., *op. cit.*, pp. 16, 143, 334–336.

[6] Beard, C. A., *The Supreme Court and the Constitution*, p. 31.

[7] Ransom, W. L., *Majority Rule and the Judiciary*, Introduction by Theodore Roosevelt, pp. 3–24.

[8] Hutchinson, T., *History of the Province of Massachusetts Bay from 1749 to 1774*, pp. 92–95.

[9] Green, J. R., *History of the English People*, Vol. IV, pp. 215 ff. Channing's *History of the United States*, Vol. II, years 1760–74.

[10] N. Y. Commission of 1915, *Index Digest of State Constitutions*, pp. 1268 ff.

[11] *North American*, Philadelphia, Feb. 11, 1925.

[12] *Bulletin*, Philadelphia, Mar. 15, 1925, reporting McBride v. Borkouski.

[13] State v. Mullen, 63 Mont. 50.

[14] N. Y. L. R. See related case of People v. 738 Bottles of Intoxicating Liquors, 116 Misc. 252 (N. Y. 1921).

[15] State v. Jokosh, 193 N. W. 976 (Wis.).

[16] Carroll v. United States, 267 U. S. 132 (1925).

[17] 116 U. S. 616.

[18] Sobel, Leon, *Search and Seizure*, Senior Research Thesis, prepared under the direction of the author in 1925, p. 64.

[19] Marron v. United States, 275 U. S. 192 (1927).

[20] Olmstead v. United States, 277 U. S. 438 (1928).

[21] Sobel, Leon, *op. cit.*, p. 77.

[22] *Ibid.*, quoting Florida judge in Baily v. Portier, 97 So. 311.

[23] Cooley's *Blackstone*, Book IV, p. 325.

[24] *Ibid.*, Book IV, p. 327.

[25] Coudert, F. R., *Certainty and Justice*, pp. 101 ff.

[26] Judson, F. N., *The Judiciary and the People*, pp. 246 ff. Abbot, E. V., *Justice and the Modern Law*, pp. 70 ff. Baldwin, S. E., *The American Judiciary*, p. 231.

[27] *Ibid.*, pp. 243, 248. Willoughby, W. W., *Constitutional Law*, Vol. II, pp. 816 ff. Cooley, T. M., *Constitutional Limitations*, pp. 399 ff. Callender, C. N., *American Courts*, p. 185.

[28] Alger, G. W., *The Old Law and the New Order*, p. 70. Baldwin, S. E., *op cit.*, pp. 360 ff. Cooley, T. M., *op. cit.*, p. 379. 6th Amendment.

[29] *Ibid.*, p. 380.

[30] Stimson, F. J., *Federal and State Constitutions*, p. 176. 6th Amendment.

[31] *Ibid.*, p. 175. Cooley, T. M., *op. cit.*, pp. 405 ff. 6th Amendment

[32] Baldwin, S. E., *op. cit.*, pp. 234 ff. 8th Amendment.

[33] Hall, J. P., *Constitutional Law*, pp. 108, 109. 8th Amendment.

[34] Cooley, T. M., *op. cit.*, p. 404. 8th Amendment.

[35] Hall, J. P., *op. cit.*, p. 108.

[36] State v. Feilen, 70 Wash. 65 (1912).

[37] Smith v. Board of Examiners, 85 N. J. Law 46 (1913). *American Year Book* for 1914, pp. 254, 263. The Iowa law was declared invalid in Davis v. Barry, 216 Fed. 413 (1914).

[38] *American Year Book* for 1916, p. 403.

[39] *American Year Book* for 1925, p. 248; Idaho, Minn., Ore., and Utah.

[40] *American Year Book* for 1925, p. 685.

[41] Buck v. Bell, 274 U. S. 200 (1927).

[42] Cooley, T. M., *op. cit.*, p. 194, note. Article 1, Sections 2 and 3, Article II, Section 4.

[43] *American Year Book* for 1926, p. 118. Ogg, F. A. and Ray, P. O., *Introduction to American Government*, pp. 392–394.

[44] *Ibid.*, pp. 683, 684.

CHAPTER XXII

DUE PROCESS OF LAW: PROCEDURE

1. *Relation of Due Process to the Procedural Rights Already Considered*

Our treatment of jury trial and of the various procedural guaranties in the preceding chapters must have convinced the reader of the great importance of procedure in every age, and of the special stress put upon it by our constitution makers. The interest of the people primarily is in justice, and only as means to that end are they interested in governmental procedure. Therefore as government tends the more perfectly to record the will, intelligence, conscience, and kindly feeling of the people, and the more the agencies of the people are trusted by them, the less are they insistent on mere form and the more they demand the substance. Yet in primitive times the insistence on form was so great that the substance of justice did not seem to matter. Thus says Vinogradoff,[1] speaking of the early tribal law: " Unless the ceremony was performed exactly according to custom and in the presence of witnesses, the donation or sale did not hold good. The spoken formulae of different acts in law were strictly fixed and a slip in their utterance would cause a breakdown in the act." In our day if the chief justice misquotes the oath prescribed by the fundamental law for the president to take, it matters nothing at all, and only a child, listening in, calls the chief justice to task.[2] Holland, speaking of the modern interest in procedure, has this to say: " The true interest of the topic of Procedure is derived, first, from the close connection which may be traced between its earliest forms and the anarchy which preceded them, and secondly, from the manner in which the tribunals have contrived, from time to time, to effect changes in the substance of the law itself, under cover of merely modifying the methods by which it is enforced."[3] The overwhelming importance of due process in the judicial interpretation of our constitutions is not in the due procedure which was certainly the main purpose of the framers and possibly their only purpose in prescribing this guaranty; the present importance of due process is what the judges have read into the constitutions by the judicial amplification of due process to make it include an undefined and limitless substantive right. Due process, however, as due procedure has very real importance, and that is the subject of the present chapter.

2. *The Definition of Due Process*

The words "due process of law" and the protection connoted by them are traced back to Magna Charta. The Latin of the section, most prized of all this fundamental charter of liberties, may be translated as follows: "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land."[4] Our attention is directed to the closing phrases, "except by the lawful judgment of his peers and by the law of the land." Suppose we paraphrase these words in the light of the customs of the realm in the year 1215. "When a subject is charged with crime by a grand jury, or is tried on a criminal charge by compurgation, ordeal, or wager of battle, or when in a civil proceeding he is tried either by petit jury or by one of the older forms of trial, he shall be tried by equals[5] or superiors, never by inferiors, as a knight by villains, and his trial shall be by the settled usages and previously existing law and not according to arbitrary pronouncement of royal will." The people were taken into partnership in the enforcement of law, and the law was the customary law, the good old laws of the kingdom which every king at his coronation took oath to preserve. Ordeal suddenly dropped out of the picture in the next year, 1216.[6] Compurgation faded away, but the last faint traces of it were not removed from the law till

1827.[7] Wager of battle in course of time became obsolete, but was not abolished by statute till 1819.[8] Trial by petit jury became the ordinary method in both civil and criminal cases. In the time of Edward III there was already a high development of the law on its procedural side, and the terms employed to describe legal procedure were due process of law and due course of law.[9] As the emphasis was upon procedure in stipulating for the judicial settlement of disputes, about the year 1354 in one of the frequent confirmations of the Great Charter the phrase "due process of law" was used in place of the vaguer "law of the land."[10] The little Latin word *vel* which had the two meanings of "and" and "or" came to mean "or" in this section,[11] so the closing phrases of the section came to be translated, "except by the lawful judgment of his peers or by due process of law." As there were other methods of trial than by jury, the meaning of the guaranty came to be that a subject, charged with crime, was entitled to indictment by grand jury and to trial by petit jury, and a subject, made defendant in a civil proceeding, was entitled to a jury trial or other trial equally recognized as a duly established legal procedure.[12] Every person in the protection of his life, liberty, and property was entitled to due process, that is, to due procedure.[13]

This guaranty was conceived to be, first, due process in courts of justice.[14] But private persons, exercising self-help, and officers of government, enforcing the law, were answerable to the courts for due process, a procedure prescribed by law. Was Parliament answerable to the judges for due process in its proceedings? Parliament was the king, acting with the advice and consent of his lords and commons. It was in theory the general assembly of the nation, exercising law-making power, not as in the time of Magna Charta when there was no Parliament and when the king with his council was regarded as finding, not making, law. Not only did Parliament make law, it upon occasion supervised the execution of the nation's will, and, as the High Court of Parliament, it exercised judicial power. While it was the duty of Parliament to observe due process, it was the judge of its own procedure, and what it declared to be the law, was the law. Although Chief Justice Coke would have made the common law judges superior to Parliament, by his proposed judicial veto, his doctrine was not the dominant one at any time, certainly not in the year of our Revolution, 1776.[15] His doctrine was not the law in Great Britain and her colonies. When the legislatures became parliaments of independent states, were the legislatures answerable to the judges for due process, due procedure? No, not till made so by their constitutions.

Virginia in her bill of rights, adopted June 12, 1776, had a section devoted to the procedural rights of persons charged with crime and closed the section with the following general provision: " that no man be deprived of his liberty, except by the law of the land, or the judgment of his peers." [16] It is difficult to see in this provision a limitation on legislative procedure. In September of the same year the Pennsylvania convention closed its labors and adopted a section almost identical with the section quoted from the Virginia constitution. Pennsylvania created a council of censors as special guardians of the constitution,[17] so it could not possibly be said that the framers intended the judges to veto laws as violating the law-of-the-land clause. The Fifth Amendment of the federal constitution marked the entrance into our constitutions of the words " due process of law." [18] A provision, like those noted in state constitutions, for the protection of persons charged with crime, toward the end inserts the following general statement: " Nor [shall any person] be deprived of life, liberty, or property, without due process of law." This is a limitation upon the federal government, clearly upon its courts. In imitation of the federal constitution most new state constitutions prefer "due process" to "law of the land." Finally the 14th Amendment includes a due process clause as a limitation upon the state governments, and all their departments.

While this review of the equivalent phrases " law of the land" and "due process of law" has traced their history briefly from 1215 to 1868, and demonstrated by the usual connection with other phrases that due process means due procedure and frequently means legally established judicial procedure, yet we cannot dogmatically affirm that the words "due process" have no other meaning, and such definition as we have reached is meager indeed. Let us seek definitions outside of constitutions in great authorities. Webster said of due process, identifying it with the law of the land: "By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."[19] Webster's definition admirably defines due process in a court of justice, but does it define due process in a legislature in the passage of a tax law? The Supreme Court in Twining v. New Jersey says of due process: "Few phrases in the law are so elusive of exact apprehension as this. . . . This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions of cases as they arise."[20] Professor Corwin of Princeton has said of due process, almost paraphrasing these words of the Supreme Court: "The truth of the matter is that the modern concept of due process of law is not a legal concept at all; it comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the stand-point of vested interests, of a piratical tendency."[21]

Suppose we give up the quest for a definition of due process in the entirety of its meaning, and seek only a definition of due process as procedure. Then we find an excellent definition, made by the brilliant legal writer, William L. Ransom,[22] the friend of Roosevelt. It is: "That a man's life, liberty, or property shall not be taken except by a procedure in accordance with the fundamental ideas of fairness and regularity which obtain in Anglo-Saxon jurisdictions, which, of course, involves due notice, an opportunity to be heard and some regularity of course of action." This definition clearly defines due process as due procedure in courts of justice, according to the present, liberal interpretation of our judges. But it does not quite adequately define due process in the summary action of executive officers. And its reference to notice and hearing does not exactly fit the recognized methods of legislation. It describes judicial process, but the definition does not meet the necessities of legislation and administration.

3. *Formal Constitutionality of Statutes*

There is a due process of law required of Congress, even though the 5th Amendment may not supply it. The elaborate directions of the federal constitution for the legal exercise of the powers of Congress and the prohibitions and limitations upon Congress as to methods, constitute a legal procedure imposed on Congress. Determinations of questions of this kind are known abroad as decisions on the formal constitutionality of statutes. The question, constantly recurring, is, Has the legislature observed the procedure laid down in the law for the exercise of its powers? Have the commands of the constitution as to procedure been obeyed in the passage of acts? Are the acts formally constitutional? In monarchical Germany the Kaiser had no veto upon legislation, but questions of formal constitutionality were decided by him, and his decisions were final upon the courts.[23] This imparted a degree of certainty that published laws were really such, and that no spurious laws were imposed upon the people which had not been regularly passed by the two houses. After the passage of the Parliament Act of 1911 a procedure was required for money bills, different from the procedure for other acts. It might be a very debatable question sometimes as to what procedure was required. Decisions of this character were committed to the Speaker of the House of Commons, and his action binds the courts.[24] The framers of our federal and state constitutions may too confidently have relied upon our legislative bodies so organizing as to prevent procedural violations of the constitutions. Such violations in the mad rush of business sometimes occur, sometimes by collusion of certain members of the clerical staff. In such cases the mistake may not be noted till in a private litigation the discrepancy between the constitutional requirement and the journal record of the actual procedure is brought to light. Then the judge makes the comparison and properly declares the law unconstitutional. He is not pronouncing an act, regularly passed, invalid, and so setting up the judicial determination against the legislative. He is pronouncing a published act invalid because it was never passed. He is cooperating with the legislature in protecting it and the people from fraud. Yet it would make for greater efficiency in legislation if the president and governors were given the power and duty of determining the formal constitutionality of statutes.

Our conclusion, as to formal constitutionality, is then that, in the purpose of the framers, Congress is bound in its own procedure not by the 5th Amendment but by the many procedural requirements laid down in the body of the constitution, and that Congress is the authoritative interpreter of the procedure thus imposed. In the absence of such authoritative interpretation when published acts were never really passed by Congress the courts properly declare them to be null and void. But we must not confuse history and science with the actual present custom. By the assumed power of judicial review the courts have made themselves the final authorities upon the procedure imposed by the constitution on Congress and they hold that Congress is bound by the due process clause of the 5th Amendment.[25] We must remember also that by the due process clause of the 14th Amendment all departments of the state governments are bound.

4. *Jurisdiction, Notice, and Hearing Essential in Courts of Justice*

While Congress is bound by the procedure laid down in the constitution and state legislatures are bound by the procedure laid down in state constitutions, when not overruled by the supreme law of the land, due process in courts of justice is of far greater importance than legislative procedure, and yet the constitutions that guarantee due process in courts of justice assume that the people know what is guaranteed and do not define the term. All the great documents from 1215 to 1868 employed the terms law of the land, due course of law, and due process of law with primary reference and almost exclusive reference to courts of justice, and the content of the idea was principally, if not wholly, the legally established procedure of courts of justice. We have noted the definitions of Webster and Ransom but now we must attempt to analyze into its essential elements due process of law, in the sense of due procedure, in courts of justice.

Due process has always been associated in the minds of the people and in the historic documents as closely related to jury trial.[26] A long line of federal decisions made jury trial an essential element of due process in appropriate cases, but after the adoption of the 14th Amendment with its due process clause, it would be difficult to maintain this essential connection of due process with jury trial, unless the federal jury system were imposed on the states, and this was not intended. Many states had modified the common law jury system. Finally Congress guaranteed due process to the unincorporated territories, but not jury trial. Therefore to avoid confusion it was found best to regard the rights to jury trial and to due process as quite separate.[27] Ransom's definition is therefore made in the light of these more recent decisions.

If due process does not include jury trial, and by inference does not include other specific procedural requirements laid down in the constitution, what are its elements? The first to be named, though not specifically mentioned by Ransom, is jurisdiction. If you sue a person to require him to pay a certain sum of money or to perform a certain act, the court must have gained control over his person. This is considered to be the case if he is domiciled in the state and is served with the process of the court, or if he consents to subject himself to its jurisdiction.[28] If a judgment is sought concerning property, such as land, the property must be within the state, and jurisdiction is thus obtained though the residence of the owner may be unknown.[29] The courts greatly differ in the jurisdiction as to subject matter which is assigned to them by law, but when a state law gives a judge too great interest in the conviction of persons charged with crime, through sharing in the fines imposed, the right of the defendant to an impartial judge is violated.[30] The United States Supreme Court decides that the accused is deprived of due process of law. The Morse brothers were arrested in Massachusetts and Connecticut and were passing through New York on the way to Washington to stand trial there when they were taken from the train by a United States marshal upon bench warrants issued on federal indictments charging them with fraudulent use of the mails. The highest court decided that when one is indicted in two federal courts he could not complain of any violation of comity from the refusal of one court to respect the jurisdiction of the other.[31]

Not only must there be jurisdiction, there must be notice and hearing,[32] the opportunity of a hearing. Once due process meant common law procedure; now it means any regular procedure that gives a fair trial.[33] An effort was made to cancel the oil lease of an infant Indian, made by his mother as guardian, on the ground that there was no notice of her appointment to this infant of tender years, but the court decided that as the young child was in the custody of the mother the requirement of notice by the judge to the child was purely formal and there was no denial of due process.[34] A Seattle lawyer supplied his clients in the county jail with narcotics. The absence of the required stamps from a narcotic drug store was *prima facie* evidence of his violation of the statute. At his hearing the burden of explaining and justifying his possession of the narcotics was held not to be a violation of due process.[35]

5. *Summary Extra-judicial Remedies May be Due Process*

In certain cases where usage had become settled before the constitution was adopted, such settled usage was held to be due process even without notice and hearing. Reference is made to the seizure and sale of the property of federal customs collectors who were indebted to the government. There had been no notice or hearing yet there was no violation of due process.[36]

A person's property which has been used for illegal purposes or which has become a nuisance may be destroyed without judicial inquiry. This is done in the case of nets, used in illegal fishing, and gambling paraphernalia.[37] Diseased cattle may be killed. Houses in the path of conflagration may be pulled down. Unwholesome meat, decayed fruit, and obscene books may be destroyed by officers without violation of due process. Yet if there has been no violation of law the owner may replevy his property or he may sue the officer for the value of the property when it has been destroyed.[38]

6. *Administrative Boards May Exercise Legislative and Judicial Functions Without Violation of Due Process*

When a legislature prohibits the killing of game at certain seasons or when it regulates the hours in certain occupations, it is not necessary to give a hearing to the parties affected by the legislation. So too the legislature may give over the details of such legislation to a commission, and such commission is no more bound to give notice and hearing than the legislature would be, so far as these rules and ordinances are concerned.[39] Such an administrative board may also perform judicial functions. Due process of law does not require that judicial functions shall be limited to the judiciary.[40] The administration of the land system, the determination of lands benefited by irrigation schemes, the value of property taken for public use, the classification of mail, exclusion of fraudulent matter from the mails, and the appraisal of imported goods are all illustrations of cases where determination of facts is made by administrative boards. A striking illustration of this was the exclusion of the Chinaman Ju Toy[41] who claimed to be American-born. As to this question of fact the Department of Labor decided that he was not a native-born citizen. When Ju Toy took his claim to the Supreme Court the decision was that this determination of fact was due process and that Ju Toy was not entitled to a judicial trial.

7. *Yet the Final Decision upon Questions of Law in Administrative Cases is in the Courts*

One of the demands of modern civilization is governmental regulation of all sorts of activity, especially when it is business affected with a public interest. The legislatures cannot make detailed rules which may be quickly changed as circumstances require. The courts cannot give decisions in such matters quickly and cheaply. Therefore administrative boards are necessary. These commissions exercise executive, quasi-legislative, and quasi-judicial functions. But you will note that the laws creating the commerce commission, the trade commission, the reserve bank board, and many other bodies all provide for appeal to the courts on questions of law. These bodies may decide questions of fact finally, but the interpretation of law may be appealed to the courts. This is in accordance with the English precedents which we inherited. There courts always had power to bring before them the executive officers and to punish them for the violation of law as the judges found the law to be. The judges always had the power to invalidate the ordinances of subordinate rule-making bodies. The judges have the power to pass upon the procedure of these subordinate bodies and executive officers and determine as to its conformity with law.

Very few cases have gone to the United States Supreme Court in recent years on the jurisdiction, notice, and hearing in courts of justice, unrelated to decisions of administrative bodies, but a multitude of cases have involved the jurisdiction, notice, and hearing in administrative bodies exercising quasi-judicial powers. A state legislature may by statute create a road district[42] through a local body exercising delegated legislative power, without providing for a hearing of property owners within the proposed district. This is an exercise of legislative power, and there is no violation of due process. Yet if a state legislature requires non-resident users of its highways to designate a state official to receive service of process in actions against such non-residents, the statute is not valid if it does not provide that all such accused non-residents be notified of the proceedings, even though all such persons are actually notified.[43] Would it not have been better had the court read into the statute the requirement to which the official had actually conformed, for this decision permitted a victim to suffer without compensation by the wrongdoer? The Interstate Commerce Commission may exercise the quasi-legislative power of imposing demurrage charges as penalty for detention of cars, and the publication of the tariff of charges is notice to the shippers.[44] Here is no violation of due process. In another case a taxpayer complained that he was not given notice and opportunity to be heard on the original assessment of the value of his property for purposes of taxation, but after assessment he was permitted to appear and be heard on the question of valuation before arbitrators whose decision was final. This, it seems, was an administrative determination of fact and was due process.[45] In still another case property was condemned for a road by eminent domain. Though no hearing on property damages was given by the county commissioners, an appeal to the courts was permitted within thirty days for review of damages. This provision for judicial hearing on the amount of damages in eminent domain rendered the proceeding due process.[46] In these and many other cases there was appeal to the highest court to determine if due process in the sense of due procedure had been observed.

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[1] Vinogradoff, Sir Paul, *Outline of Historical Jurisprudence*, Vol. I, "Tribal Law," p. 364.

[2] *Public Ledger*, Philadelphia.

[3] Holland, T. E., *Jurisprudence*, p. 354.

[4] Mott, R. L., *Due Process of Law*, p. 3.

[5] *Ibid.*, p. 31, Note 7, for other views.

[6] Stephen's *Commentaries*, Vol. IV, p. 363.

[7] *Ibid.*, Vol. IV, pp. 389, 390, Note.

[8] *Ibid.*, Vol. IV, p. 367.

[9] Mott, R. L., *op. cit.*, p. 4, Note 11.

[10] *Ibid.*, p. 4.

[11] *Ibid.*, p. 3, Note 8, p. 33.

[12] *Ibid.*, p. 6, Note 21, p. 7, Note 23.

[13] *Ibid.*, p. 5, Note 14.

[14] *Ibid.*, pp. 41, 42.

[15] *Ibid.*, pp. 49–56.

[16] Bill of Rights, Sec. 8.

[17] Constitution of 1776, Declaration of Rights, Art. IX, Frame of Government, Sec. 47.

[18] Hughes, C. E., *The Supreme Court of the United States*, pp. 184 ff.

[19] *Ibid.*, p. 188.

[20] Twining v. New Jersey, 211 U. S. 78. Willoughby, W. W., *On Constitutional Law*, Vol. II, p. 857.

[21] Ransom, W. L., *Majority Rule and the Judiciary*, quoting E. S. Corwin, p. 35. Corwin wrote for the *Political Science Review*, May, 1912.

[22] *Ibid.*, pp. 52, 53.

[23] Howard, H. E., *The German Empire*, pp. 42, 114, 118–122.

[24] Lowell, A. L., *The Government of England*, Vol. I, pp. 433 ff.

[25] Hepburn v. Griswold, 8 Wall. 603.

[26] Ex parte Bain, 121 U. S. 1. Thompson v. Utah, 170 U. S. 343. American Publishing Co. v. Fisher, 166 U. S. 464. Springville v. Thoms, 166 U. S. 707. Coudert, F. R., *Certainty and Justice*, pp. 71 ff.

[27] *Ibid.*, pp. 72 ff. Downes v. Bidwell, 182 U. S. 244. Hurtado v. Calif., 110 U. S. 516. Maxwell v. Dow, 176 U. S. 581. Weems v. United States, 217 U. S. 349. Dorr v. United States, 195 U. S. 138.

[28] Callender, C. N., *American Courts*, pp. 20 ff.

[29] *Ibid.*, pp. 20 ff.

[30] Tumey v. Ohio, 273 U. S. 510 (1927).

[31] Morse v. United States, 270 U. S. 151 (1925).

[32] Callender, C. N., *op. cit.*, pp. 69 ff. Andrews, J. D., *American Law*, Vol. II, p. 1161.

[33] Hurtado v. Calif., 110 U. S. 516. Twining v. New Jersey, 211 U. S. 78.

[34] Jones v. Prairie Oil & Gas Co., 273 U. S. 195 (1927).

[35] Casey v. United States, 276 U. S. 413 (1928).

[36] Murray's Lessee v. Hoboken, 18 How. 272.

[37] Freund, E., *Police Power*, pp. 558 ff.

[38] *Ibid.*, p. 558.

[39] Willoughby, W. W., *op. cit.*, Vol. II, p. 1318.

[40] Willoughby, W. W., *op. cit.*, Vol. II, p. 863.

[41] McBain, H. L., *The Living Constitution*, pp. 90 ff.

[42] St. Louis R. Co. v. Nattin, 277 U. S. 157 (1928).

[43] Wuchter v. Pizzutti, 276 U. S. 13 (1928).

[44] Turner Lumber Co. v. Chicago M. and St. P. R. Co., 271 U. S. 259 (May 24, 1926).

[45] McGregor v. Hogan, 263 U. S. 234 (Nov. 12, 1923).

[46] North Laramie Land Co. v. Hoffman, 268 U. S. 276 (May 11, 1925).

CHAPTER XXIII

DUE PROCESS OF LAW: SUBSTANTIVE RIGHT

1. *Review of Due Process as Due Procedure*

We have seen that primitive law always emphasized the importance of procedure. Forms and ceremonies were not only essential, they were frequently picturesque memorials of a still more primitive state of society. Thus the early Romans began a law suit with a mimic battle and the interposition of the magistrate in the name of the law.[1] Accordingly Magna Charta, standing at the forefront of English statutes, made much of procedure. Yet there is a vagueness in the terms employed which makes difficult the office of the expositor.[2] What is the meaning of "lawful judgment of his peers," the peers of a freeman charged with crime? Some have thought it meant judgment in the king's court before the whole body of peers of the realm, the barons giving judgment on a baron.[3] Even to-day a peer or peeress, charged with high crime, like treason or felony, is tried in the High Court of Parliament, only peers attending, or in the court of the Lord High Steward, to which all the peers of Parliament are summoned. This privilege is not granted when the charge is of a lesser crime.[4] But the judges went about the country on circuit in the period of Magna Charta; their courts were equally king's courts, and the judgment was by peers in the sense of equals.[5] In the course of time this came to mean jury trial, as we have seen. So too there was a vagueness in the meaning of the phrase "by law of the land."[6] It might mean by a procedure previously established by law, or in conformity with preexisting law, whether procedural or not. When the phrase was changed to "due process of law" there was evident emphasis on procedure, perhaps to the exclusion of all else. Sometimes judges, not willing to change provisions of the common law which had become firmly established, were able to evade its application in a particular case and so prevent injustice by procedural legerdemain. This method in time might be so extended that a law would have such narrow application as to be practically obsolete, or might become entirely so. Therefore it was possible on rare occasions to give a more expanded meaning to due process than due procedure, and there was the danger of reading into due process a vague, esoteric meaning under cover of which judges might extend their powers beyond their proper functions. This development was prevented in England by the establishment of the doctrine of parliamentary sovereignty. In the colonies, on the eve of the Revolution, there was the menace of Coke's dicta, as interpreted by Otis, being adopted as a fundamental principle of government. The actual wording of the early constitutions does not indicate that the framers lost their cunning. They imposed many procedural requirements, based on experience, upon the legislatures. They imposed upon the agencies of law enforcement, whether judicial or administrative, the requirement of due process of law or law of the land. These phrases would mean in 1776 just what they had come to mean in the English common law and the colonial common law in that year, a procedure based on settled usage, or established custom, or statute, a procedure subject to amendment by statute.

2. *Distinction Between Adjective Right and Substantive Right, and Definition of Due Process as Substantial Justice*

A man's right to life, liberty, or property is a substantive right. For the protection of his life, liberty, or property his right to a procedure which accords with the fundamental ideas of fairness and regularity is an adjective right. This distinction is brought out in the English case of Poyser v. Minors, in the decision of which the court defines procedure as "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer — the machinery as distinguished from its product."[7]

Strangely enough due process, which in 1776 was a procedural right, an adjective right, and practically nothing else, and was a limitation upon the king, acting through his judges and his administrative officials, has since 1776 and in this country become a limitation on the legislature, the executive, and the judiciary, and it has further been extended to include substantive right as well as adjective right.

In the preceding chapter we examined Ransom's definition of due process as due procedure. To this we must add his definition of due process as substantial justice. Due process requires, "That property shall not be taken by any legislative act which violates fundamental ideas of morality and justice, keeping in mind the paramount public interests which may be involved."[8] This definition is skillfully drawn from the opinions of the judges, but the courts themselves refuse to define due process. That is, they refuse to define due process as a substantive right and a limitation upon the legislatures. They are quite free to define due process in courts of justice which there retains its earlier character as an adjective right, as due procedure. Mr. Justice Sanford recently gave such a definition, first quoting from an earlier opinion and then adding words of his own. He said: "The words due process of law, when applied to judicial proceedings, 'mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.'[9] They require a proceeding which, observing the general rules thus established, follows forms of law appropriate to the case and just to the parties to be affected; and which, whenever it is necessary for the protection of the parties, gives them an opportunity to be heard respecting the justice of the judgment sought."[10] Mr. Justice Sanford is describing a procedure which consists of a series of steps, each devised for the purpose of bringing justice to the parties. If each step is taken in conformity with the law and in good faith, the decision is valid, even though the result would be considered unjust by any normal person.[11] Yet if a legislature follows every procedural step with exact conformity to constitution, statutes, and rules, and equally acts in good faith, and passes a law which the enlightened countries of the world regard as the very embodiment of justice, a court may declare such law in violation of due process, because not conforming to the court's conception of justice. The legislature is judged not by its procedure but by its product, and due process is said to be violated. A court is judged by its procedure, and not by its product, however unjust, and this is said to be due process.[12]

3. *The Guaranty of Due Process in the 5th Amendment as a Limitation on the Federal Government*

We have seen that the constitution contained definite procedural limitations on Congress. It is difficult to see that the 5th Amendment, due process clause, as requiring due procedure, could make any additional requirement as mere procedure, unless it could be interpreted as requiring Congress to follow its own laws on procedure. Surely each house could change its own rules as it pleased.[13] We must realize that Ransom's definition of due process as a substantive right, applying only to Congress and not to the courts, was reached at the end of a long development which we are about to trace. The due process clause of the 5th Amendment guaranteed that the executive could take life, liberty, or property only by methods generally recognized as regular and the federal courts could do this only as they met the requirements of jurisdiction, notice, and hearing.

The new conception of due process as a substantive limitation on the legislature appears to have achieved its first victory in actually declaring a law unconstitutional as violating due process in the sense of substantial justice in the case of Wynehamer v. People, in the New York Court of Appeals in 1856.[14] A state prohibition law was declared unconstitutional as violating due process, not because it was irregularly passed, but because it destroyed vested rights in liquor. Many other states in that period were passing similar laws, and the laws were upheld by the courts. This Wynehamer decision was a black sheep and was in general disrepute.[15] Yet it strikingly resembles the case of Marbury v. Madison. Judged by every concrete standard the great decision of Marshall was erroneous, but as a philosophical argument upon a hypothetical case it was magnificent, and it fastened judicial review on the country. So this Wynehamer case was repudiated as an authority on the police power in relation to vested rights, but in its discovery of due process as a possible weapon to be used against legislation, as an elastic yardstick by which legislation could be measured and found wanting, it has been equally fruitful with Marshall's decision.[16] In the early case of Calder v. Bull,[17] Mr. Justice Chase of the United States Supreme Court declared: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution, or fundamental law of the state." He is proclaiming the power of courts to nullify state laws, not because they violate the state or the national constitution, but because they violate the fundamental principles of free government. The court withdrew from this untenable position, but now the Wynehamer case suggested that the due process clauses of the federal and state constitutions could serve the same purpose as the nebulous law of nature and do it more effectually, as now it could be said the constitution was violated.

Accordingly in the very next year Chief Justice Taney in writing his opinion in the case of Dred Scott v. Sanford, grasped at this straw, presented by the state case, but due process was given very minor consideration and the other judges did not refer to it at all.[18] Taney held that the Missouri Compromise Act was unconstitutional as violating the due process clause of the 5th Amendment by taking the vested rights of slave holders.[19] This decision was regarded by Lincoln and the Republicans as monstrous. This decision was reversed by the war and the war amendments. In the case of Hepburn v. Griswald,[20] 1870, the Supreme Court declared the legal tender act unconstitutional because not appropriate means to carry out a power committed to Congress, contrary to the spirit of the constitution as impairing the obligation of contracts, and finally in violation of the due process clause. This was another bad decision and was reversed by the Supreme Court in two years.[21] In 1898 Congress passed a law making it a criminal offense against the United States for an officer of an interstate carrier to discharge an employee because of membership in a labor union. In the case of Adair v. United States [22] in 1908 this law was held not to be authorized by the interstate commerce clause, and to be positively bad, because it conflicted with a specific provision of the constitution, the due process clause of the 5th Amendment. How specific the provision is we have seen. The regularity of the procedure in passing the act was not contested. It violated due process as substantial justice. One hundred and eighteen years had been required to fasten this definition of due process upon the 5th Amendment.[23]

4. *The Guaranty of Due Process in the 14th Amendment as a Limitation on the State Governments*

The 14th Amendment contains the provision that, "No state shall . . . deprive any person of life, liberty, or property without due process of law." This amendment of 1868, adopted to protect the freedmen from hostile action by states through any department of state government, should so far as it employed the same language as the 5th Amendment have the same interpretation. That is, if the words "due process of law" meant "due procedure" in 1789, they should have the same meaning in 1868. To be sure there had been the Dred Scott decision in 1857, suggesting a larger meaning than due procedure. But this minor point had not the support of the majority of the court, and the precedent was of doubtful validity.

While the 14th Amendment was adopted for the special protection of the freedmen, the terms employed were properly so general that all citizens and all persons could claim its protection. The amount of litigation that came up to the Supreme Court, claiming the violation of rights guaranteed by the amendment, appalled the court. In 1877 in the case of Davidson v. New Orleans[24] Mr. Justice Miller read the lawyers a stern lecture. He said, referring to due process of law: "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or in the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." The plaintiff claimed that in this case, involving assessment for a public work, the law was unconstitutional, the procedure of the local authorities unfair, and the decision of the state court erroneous. But as to cases of this kind Mr. Justice Miller says: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." Mr. Justice Bradley was not satisfied with this narrow view of due process of law, but thought that if a taking under the power of assessment is " found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law."

With a divided court and the uncertainty of the definition of due process the lawyers kept coming until they converted the court to their view which was the view stated by Mr. Justice Bradley. Therefore in 1883 in the case of Hurtado v. California [25] the court plainly declared that the due process clause guarantees " not particular forms of procedure but the very substance of individual rights of life, liberty, and property." Before the Hurtado case there had been about one hundred cases coming up to the United States Supreme Court under the due process clause of the 14th Amendment. In the following 34 years there were over five hundred such cases.

This extension of the interpretation of due process in the 14th Amendment was binding not only upon the lower federal courts, but also upon the state courts, as in effect agents of the federal government in the enforcement of the supreme law of the land.

5. *The Guaranty of Due Process in the State Constitutions as Limitations on the State Governments*

About 28 state constitutions have due process clauses, and about 12 have law-of-the-land clauses. Four of the states have provisions for both due process and law of the land. New Jersey and a number of states have neither of these provisions — apparently 12 states.[26]

We have seen that it was the suggestion of a New York case that foisted the expanded interpretation of due process upon the country. Yet in an earlier New York case there was the refusal to declare a law void because it was unjust " or from a broad, loose, and vague interpretation of a constitutional provision beyond its natural sense."[27] Professor Mott[28] reports Chief Justice Ames, just after the Wynehamer and Dred Scott cases, as denouncing the pernicious habit of attempting to hold any statute which the courts dislike, void by wrenching some of the clauses of the constitution to cover the case. He asserted that the due process provision had a definite meaning. "It is no vague declaration concerning the rights of property, which can be made to mean anything and everything; but an intensely practical, and somewhat minute provision guarding the rights of persons accused of crime, at the various points at which they may be exposed, when pursued, or on trial, to oppression from the state or its officials."[29]

When by the Hurtado decision in 1883 the United States Supreme Court made the due process clause of the 14th Amendment the means of legislative supervision over state laws and invested the state courts with the same power, it was natural for the state courts to apply the same interpretation to the due process and law-of-the-land clauses of their own constitutions. Utah had passed a law limiting the hours of miners, which was sustained by the United States Supreme Court in 1898.[30] Colorado in 1899 adopted the same law, but the supreme court of that state declared the law unconstitutional. The court refused to follow the decision of the United States Supreme Court, as being itself the court of last resort in the interpretation of the state constitution.[31] It was therefore necessary to amend the state constitution and afterward to pass a new law, which was delayed in becoming effective by the referendum, so that the law was not in force till 1913 or 14 years after the first passage.[32]

6. *Due Process in Conflict with Modern Social Legislation*

This age of machinery and increased population has required advanced social legislation. All the great industrial countries have bowed to this necessity, and some of the smaller countries, like New Zealand and Switzerland, have been successful experimental stations for advanced legislation of this character. The wave of reform in time reached this country which was conservative because it was big and prosperous. The new legislation was passed under the police power of the state. The result was that an undefined police power was measured by an undefined due process.

Many of the laws embodying the new social consciousness were passed by the New York legislature. The New York Court of Appeals has been sharply criticized for invalidating many of these laws.[33] But in one case the New York court did actually take judicial notice of published medical opinions and vital statistics. Therefore in 1904 it upheld the ten hour act for the employees of bakeries.[34] Most unfortunately the United States Supreme Court held the law invalid as violating due process. This decision in Lochner v. New York,[35] 1905, is regarded as a judicial miscarriage not likely to be repeated,[36] yet it has been cited in recent decisions.

7. *Difference in Spirit Between National and State Supreme Courts and Between State Supreme Courts Among Themselves in the Interpretation of Due Process*

Men of wide social vision, who constituted the minority of the United States Supreme Court in 1905, were in majority by the year 1911 when Mr. Justice Holmes delivered the opinion of the court in the case of Noble State Bank v. Haskell,[37] but at the present time men of this type are often in the minority. Several of its members are profound students of modern social conditions, and Americans are justly proud of the court as one of the finest in the world. The Lochner case is not typical of the United States Supreme Court, but a case, illustrating the spirit of state courts, is In re Jacobs,[38] decided by the New York Court of Appeals in 1885.

Mr. Roosevelt gave a list of the most criticized decisions of that court. As early as 1885 New York sought to end the sweating system of tenement-house workshops by prohibiting the manufacture of cigars and other tobacco products in tenement houses in cities of the first class. The law was declared unconstitutional as an abuse of the police power and in violation of due process in seeking to force the workman "from his home and its hallowed associations and beneficent influences, to ply his trade elsewhere." Commons and Andrews say that, "Had this pioneer statute been sustained, the entire problem of tenement-house labor might have been disposed of almost at its beginning."[39] This set-back in the Jacobs case changed the method of attacking the problem for a period of 28 years, but in 1913 New York returned to the prohibitory method as alone satisfactory. Roosevelt[40] said that this decision caused hundreds of thousands of men and women to be brought up in conditions of reeking filth and squalor, for this decision held back the proper solution of the problem in other states.

8. *The Distinction Between Judicial and Political Functions of Courts, and the Excessive Political Power Which the Judges Have Assumed Through Their Interpretation of Due Process*

The criticism of the judicial abuse of the power of interpretation, particularly the interpretation of due process, is directed against the United States Supreme Court from time to time, but more frequently and more bitterly it is directed against state courts. They disagree with one another and with the United States Supreme Court. This is because they are deciding cases not by reference to known laws, but by reference to their varying conceptions of what is proper policy. They are performing political functions, not judicial functions.[41] The assumption of judicial review brought great power to the courts, but they were still checked by the sharply defined provisions of the constitutions. But when due process was enlarged to include a substantive right, undefined and limitless, the courts may declare laws unconstitutional, not by any definite standard in the constitutions, but by the law of nature, the fundamental principles of free government, by Classical Liberalism, or by Montesquieu's idealization, and so misinterpretation, of the English system of government, and the decision, however reached, becomes a precedent for succeeding decisions.

[1] Morey, W. C., *Outline of Roman Law,* 2nd Ed., p. 17.

[2] Mott, R. L., *Due Process of Law,* p. 30.

[3] *Ibid.,* p. 31, Note 7.

[4] Stephen's *Commentaries,* Vol. IV, pp. 256–263.

[5] White, A. B., *Making of the English Constitution,* pp. 156, 165.

[6] Mott, R. L., *op. cit.,* p. 34.

[7] Pollock, F., *A First Book of Jurisprudence,* p. 78, Note.

[8] Ransom, W. L., *Majority Rule and the Judiciary,* p. 53.

[9] Pennoyer v. Neff, 95 U. S. 714.

[10] Endicott-Johnson Cor. v. Encyclopedia Press, 266 U. S. 271 (1924).

[11] Baldwin, S. E., *American Judiciary,* p. 56: "Chief Justice Bleckley of Georgia once remarked that courts of last resort lived by correcting the errors of others and adhering to their own."

[12] *Ibid.,* p. 57: "If the court falls into error as to its (the constitution's) meaning, the correction must ordinarily come from its own action or not at all."

[13] Willoughby, W. W., *On the Constitution,* Vol. I, pp. 564 ff.

[14] Wynehamer v. People, 13 N. Y. 378 (1856).

[15] Mott, R. L., *op. cit.,* p. 320.

[16] *Ibid.,* p. 318.

[17] 3 Dall. 386 (1798).

[18] Corwin, E. S., *Doctrine of Judicial Review,* pp. 149 ff.

[19] Dred Scott v. Sanford, 19 How. 393.

[20] Hepburn v. Griswold, 8 Wall. 603 (1870). Moore, B. F., *The Supreme Court and Unconstitutional Legislation,* p. 118.

[21] Legal Tender Cases, 12 Wall. 457 (1872).

[22] Adair v. United States, 208 U. S. 161 (1908).

[23] Commons and Andrews, *Principles of Labor Legislation,* pp. 113, 120. Though laws of this character, passed by many states, have been invalidated, C. and A. think that both employers and employees should have complete freedom to combine and make their organizations effective.

[24] Davidson v. New Orleans, 96 U. S. 97 (1877).

[25] Hurtado v. California, 110 U. S. 516 (1883).

[26] N. Y. Commission of 1915, *Index to State Constitutions,* pp. 972 ff.

[27] Cochran v. Van Surlay, 20 Wend. 365 (N. Y. 1838).

[28] Mott, R. L., *op. cit.,* pp. 319 ff.

[29] State v. Keeran, 5 R. I. 497 (1858).

[30] Holden v. Hardy, 169 U. S. 366 (1898).

[31] In re Morgan, 26 Colo. 415 (1899).

[32] Commons and Andrews, *op. cit.,* p. 240, Note 4.

[33] Ransom, W. L., *op. cit.,* Introduction by T. Roosevelt, pp. 3–24.

[34] People v. Lochner, 177 N. Y. 145 (1904).

[35] Lochner v. New York, 198 U. S. 45 (1905).

[36] Commons and Andrews, *op. cit.*, pp. 242, 243.

[37] Noble State Bank v. Haskell, 219 U. S. 104 (1911).

[38] In re Jacobs, 98 N. Y. 98 (1885).

[39] Commons and Andrews, *op. cit.*, p. 337.

[40] Ransom, W. L., *op. cit.*, p. 16.

[41] Ogg and Ray, *Introduction to American Government*, p. 685.

CHAPTER XXIV

EQUAL PROTECTION OF LAW

1. *Review of Due Process of Law*

The praetors and jurisconsults of Rome developed out of the Twelve Tables the wonderful system of private Roman law, often called the civil law, with only a minor contribution by formal legislation through comitia or emperors. The judges of England developed out of primitive Germanic customs the highly praised system of the English common law with parliamentary intervention only when substantial changes in the law were required by changes in conditions. The American judges, whom we revere as not inferior to any who live now or have lived before, have developed out of written constitutions a system of constitutional law, which is the judge-made constitution, defining the rights and duties of our citizens, and controlling the supposedly coordinate departments of the government. While written constitutions have the marks of political creeds and are pronouncements of principles, the judge-made constitutions, including both federal and state, contain numberless prohibitions on legislative action.[1] These prohibitions are handicaps and hazards that make the task of the legislator almost impossible, leave the most carefully considered and widely desired statutes in a condition of uncertainty, and often paralyze their enforcement. These checks were devised by lawyers of remarkable force and ability, and they were adopted by judges, highly trained and expert in the law of their fathers, but not receptive to the juristic philosophy of the age in which they lived.[2] The judges employed their great learning in the imposition of checks and prohibitions on the legislators whose task was to make legal adjustments incident to a changed industrial system. These law-makers were laymen,[3] well-equipped to reflect the feeling of society in general on well-articulated legislative programs, but quite incapable of devising such programs or drafting the bills contemplated in them. Legislators were until recently without executive leadership or expert assistance in drafting.[4] The elaborate machinery for the destruction of statutes was quite out of proportion to the machinery for their construction. The judges in the enlarged interpretation given due process, had free range to develop a consistent body of principles upon the subject. But those best fitted to appraise their work under this head, like Professor Freund, say: "Whatever may be the merit or demerit of the actual decisions upon the validity of legislation, the theory of constitutional law as found in the opinions interpreting due process of law is perhaps the least satisfactory department of American jurisprudence."[5] As the quality of legislation improves and the social outlook of judges broadens, the evil of our system will work out its own cure without drastic action.

There is a natural relation between due procedure and equality. We have noted the tendency to so interpret procedure as to bring about substantive changes. When due process was interpreted as due procedure in a court of justice, and law of the land was interpreted as general law, it was natural to decide, as was decided,[6] that a special law, applying to an individual, was in the nature of a judicial decision, not proper to a legislature at all. Such a law was not passed by compliance with due process, and could not be, since a legislature is not a court of justice. Such a law was not a law of the land, because not a general law. It also violated the principle of separation of powers,[7] for it was a judicial decision declared in the form of a statute. Furthermore when a number of individuals were united in a class, and a law was passed applicable only to its members, and so the law was not a general law, again there were the same objections as before.[8] If no definite provision of the constitution was violated, it still might be said to violate the spirit of the constitution and the fundamental principles of free government.[9] This principle of equality as an element of due process was not generally accepted in the period before the Civil War,[10] though there was a strong feeling against special legislation and class legislation, and sometimes special constitutional provisions were adopted to prevent these supposed evils. But there has always been special legislation, and it must continue to be enacted, if not in the legislature, then in some commission exercising quasi-legislative power.[11] Classification has always been employed and must be.[12] Therefore it must be recognized when reasonable, and so the courts, having assumed the power of judicial review, determine whether or not a classification, created by the legislature, is reasonable. As there was no uniformity as to the inclusion of equality in other guaranties, and no uniformity in the treatment of special legislation and classification, there was need of a special guaranty of equality.[13]

2. *The Right to Equal Protection is in the 14th Amendment as a Limitation on the States*

The provision in the 14th Amendment is as follows: "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The provision in the 5th Amendment is as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The natural interpretation of the 5th Amendment, together with the procedural limitations on Congress, would be: "Every department of the federal government must do things in a regular way, but however regular the way when that government needs a person's property for the public it must pay the fair value of his property." The 14th Amendment would mean: "Every department of a state government must do things in a regular way, but however regular the way the result must be fair to these freedmen and to all other persons." There has been a marked tendency to regard the due process clauses of the 5th and 14th Amendments as a generic guaranty of substantial justice comprehending within it the specific guaranties of just compensation and equal protection, thus reading into the 14th Amendment the just compensation clause of the 5th Amendment, and reading into the 5th Amendment the equal protection clause of the 14th Amendment. By these means an additional limitation is found upon the federal government and another upon the state governments. Thus as late as 1897 in the case of Chicago, Burlington, and Quincy R. Co. v. Chicago [14] the court declared that due process requires that when property is taken for public use there must be compensation, and not long thereafter in the case of Smyth v. Ames [15] the court held that due process requires the giving of equal protection. According to the doctrine of this case equal protection is only an additional emphasis on what is already included in due process. But in the provisional drafting of the 14th Amendment the due process clause was not included, and the equal protection clause was placed there to give a much needed guaranty of equality to the freedmen, and when the due process clause was inserted the equal protection clause was retained as a protection to the newly-made citizens and all other persons which would not otherwise be assured to them.[16] All along there has been a line of decisions recognizing the true historical situation, and holding that the equal protection clause added something not included in due process. In spite of the difficulty of distinguishing between a degree of equality involved in due process when interpreted as substantial justice, and the full equality guaranteed by the equal protection clause, that distinction was made in the recent case of Truax v. Corrigan, 1921, Chief Justice Taft speaking for the court. It is now the doctrine of the highest court that the equal protection clause guarantees a protection not comprehended in the due process clause.[17] This doctrine accords with correct principles of interpretation.

3. *The Right to Equal Protection Includes the Right to a Procedure that Does Not Improperly Discriminate*

A procedure may have the approval of settled usage and may have been regularly established by law, and yet meet the condemnation of the 14th Amendment, which recognized the freedmen and free negroes as citizens and entitled to equality. In Strauder v. West Virginia [18] the court held that the law of that state which made colored men ineligible for jury service was unconstitutional because denying colored men equal protection of the laws. A case coming up from Texas [19] established the same principle in the selection of grand juries. A state cannot by its laws declare colored men ineligible for grand jury service. Yet on the basis of these cases it cannot be maintained that a grand jury, charging a negro with crime, or a trial jury, trying the negro, shall be composed, wholly or in part, of negroes. It is required only that negroes shall not be excluded on account of their color from having a fair opportunity of being drawn to serve on a jury.[20] Neither does the constitution forbid the exclusion from juries of any general class of persons who through age, alienage, or incapacity, may reasonably be thought not well qualified for such service. Formerly sex was a permissible basis of disqualification, and is so still in many states.[21] Also persons engaged in certain occupations may be excluded from jury duty, not as a discrimination against them, but in recognition of their greater service to society when not thus interrupted. Lawyers, ministers of religion, physicians, teachers, and locomotive engineers are examples of this class.[22]

4. *The Right to Equal Protection is Predominantly a Substantive Right, Intended to Guard the Colored Race from Unfriendly Legislation, but It is so Broadly Stated that Its Protection is Extended to All Persons*

The purpose of the equal protection clause was to give the negro something more than due process in the sense of due procedure, and something more than equality in procedure.

The purpose of the framers was something like this: "The due process clause of the 14th Amendment will protect the negro from laws that are not regularly passed, from administrative acts which are not authorized by law, and from judicial proceedings that are not regular and fair, but this equal protection clause will protect the negro from laws which put negroes in a class by themselves and shut the door of opportunity." Such laws were the peonage laws, apprenticeship laws, and the Black Codes, the purpose of which was to reduce the negroes again to an inferior status approaching the condition of slavery. The framers would say: "We want the negroes to have a square deal, a chance to sell their wages at the best advantage, a chance to become the owners of property, a chance to educate their children — everything that is signified by equal protection of the laws."

But it would be inequitable to give protection against state action to only one race, one class, among the people. The protection should be given to all races, all classes, all persons. Accordingly the 14th Amendment became the haven of refuge for sorely oppressed corporations. A brief review may be given of some recent cases that appear, upon the whole, to register advance in the protection of corporations. Suppose an individual has a franchise for the operation of a public utility, a cotton gin, and a cooperative company is organized under a state law which in effect repeals his franchise. Has he any greater rights because a natural person, or the company any greater rights because it is a corporation? No, both are equally persons before the law, but his prior franchise protects him from a law, which, as applied to him, violates equal protection.[23] A corporation owns a warehouse, and a voluntary association of farmers is organized under a law passed to promote such cooperative selling agencies. Forty-two states have such cooperative associations and Congress has recognized their utility. The law imposed a penalty for interfering with contracts between the association and its members. The legislature considered these contracts to be of great importance to the public and peculiarly subject to invasion. May the warehouse company be penalized for permitting members to sell their tobacco to the company? The company has no valid contract with the members of the association and cannot have. Accordingly there is, by the enforcement of the law, no violation of equal protection.[24] The income of a certain railroad is limited to 8 per cent of the reported value of its property. Is this confiscation or a violation of equal protection? Railroad rates are subject to regulation in the interest of the public on the one hand and in the interest of the investors on the other. This regulation is not due to the corporate organization, but to the nature of the business as a public service.[25] A street car company of Fort Smith is required to pay for paving part of the street, but claims that street car companies of other cities are exempt from such imposition. Is this requirement in violation of equal protection? No, if there is a basis for the difference in requirement.[26]

Let us pass to the consideration of foreign corporations, that is, companies organized in other states or countries. A well-known foreign corporation, operating chain drug stores, raised strong opposition in Pennsylvania, inspired by competing firms, and a law was enacted that no additional drug stores might be opened by such a company unless all the members of the corporation were registered pharmacists. Was this state law in violation of equal protection? The legislature may provide that the public shall be safeguarded in the buying, compounding, and selling of drugs, but this law does not make reasonable regulations for these ends. It violates equal protection.[27] A foreign cab company was permitted to do business in Pennsylvania. May a discriminatory tax rate be imposed upon it, and is the company estopped from appealing for redress under the equal protection clause of the 14th Amendment? No, the tax is invalid and the company has the right to protection.[28] Suppose a foreign insurance company has met the conditions put upon its admission to do business in the state of Illinois for the protection of the state and its citizens in dealing with the corporation. May a tax, made a part of the condition for admission, which unjustly discriminates against the corporation, be contested in the courts and invalidated as in violation of equal protection? Chief Justice Taft answers, Yes. May the state punish the foreign corporation for its past non-compliance with an invalid statute? The answer appears to be, No.[29] It is the belief of the author that corporations are moving toward an equality with other persons, but there are still unreasonable barriers at state lines. While unjust restrictions may be put upon them as conditions of admission to a state, after admission it appears that they need not permanently be bound by tax impositions which are unequal and unjust, and that they may not be penalized for appeal to federal protection.

Included among persons are also aliens, and they have frequently been subjected to oppressive legislation. A case in point was that of Truax v. Raich.[30] An Arizona law required that 80 per cent of the workmen of " an employer of more than five " should be " qualified electors or native-born citizens." This act was declared in an opinion written by Mr. Justice Hughes as discriminating against the employment of aliens in practically the whole field of industry and as therefore violating the equal protection clause of the 14th Amendment.[31]

Among recent cases related to aliens may be noted the following: May the alien keeper of a pool room, without violation of equal protection, be barred from this business because he is an alien? The court held that it could not say that the city council gave unreasonable weight to the view that the associations, experiences, and interests of members of the excluded class disqualified the class as a whole from conducting a business of dangerous tendencies.[32] The legislature of Hawaii, like the Board of Control of California, considered the Japanese language schools a hindrance to the training of the young for American citizenship. A territorial law was therefore passed which would operate to abolish these schools. This act was claimed to infringe the right of the Japanese parent to direct the education of his own child without unreasonable restrictions. The court accepted this view and declared the act to be in violation of equal protection. The act may have been unwise, but the author believes that there was some evidence in its support.[33] Suppose a state law classifies aliens, with respect to the right to hold land for agricultural purposes, as those who are eligible to citizenship and those who are not eligible, giving to the former the right to hold land and denying it to the latter. Is this a violation of equal protection? The court says it is not so unreasonable as to be invalid.[34] Another case involved the power of the legislature to forbid citizens to lease to aliens, ineligible to citizenship, land for agricultural purposes. Did this violate equal protection? No, for no right of the legal owners was safeguarded by the federal constitution to lease their lands to aliens lawfully forbidden to take or hold such lease.[35] In another case it was decided that such aliens could not even enter into a cropping contract when not permitted by state law.[36] Neither may such aliens acquire stock in corporations which hold lands for agricultural purposes when the state law forbids such acquisition.[37] The land laws enacted by the Pacific Coast states against future acquisition of agricultural land by ineligible aliens, in any manner, are held not to violate equal protection of law.

5. *The Right also Protects from Discriminative Administration of Legislation which upon Its Face is Equal*

A law may have the face of a saint and the heart of a sinner. An ordinance of the city of San Francisco was of this character. It seemed pious and fair, though it gave a degree of discretion to municipal officials that showed an excessive confidence in their fairness. But in the operation of the ordinance a Chinese could not get a license for his laundry, however excellent his equipment, and a white man had no difficulty in getting a license whatever the condition of his plant. The power of administrative discretion was employed to bar Chinese from a lawful employment because they were Chinese. The court therefore said in Yick Wo v. Hopkins: [38] "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, natural to their rights, the denial of equal justice is still within the prohibition of the constitution."

As a matter of fact this San Francisco ordinance was not quite fair on its face, because the court criticized provisions in it which violated equal protection. The court also called attention to the judicial supervision always exercised over municipal ordinances. Yet the court announced the doctrine that a law, fair on its face, may be declared in violation of equal protection if it is administered with an evil eye and an unequal hand. When the court has been asked to apply this doctrine to state laws, fair on their face, but administered in such a way as to bar colored voters from the polls, it has refused to apply the doctrine.[39] When constitutional provisions have been adopted for the very purpose of disfranchising negroes, but were fair on their face, the court has been even more reluctant to declare them invalid.[40] In extreme cases, when the provisions on their face were evidently adopted to operate against the negroes, such provisions in laws or constitutions have been declared in violation of the federal constitution.[41] It appears to the author that the court by construction ought to read into a law, fair on its face, the equal protection clause, and then if the administration is discriminatory the administration alone should be condemned.[42]

6. *Yet the Right Does Not Prohibit Reasonable Classification*

The guaranty of equal protection does not mean that freedom from restraint must be given the insane because it is given the sane, or that dynamite and coal must be treated alike. It does not mean that a farmer must be subjected to a test for color blindness in order that he may be permitted to operate his tractor because such a test is required of a railway engineer. Classification is permitted if there are no unnecessary restrictions and if all persons in similar situations are treated alike.[43]

In order to reform one kind of business it is not necessary to reform every kind of business. The legislature may attack one class of evils at a time. Yet the classifications must be reasonable. An Illinois statute which declared all combinations to fix prices illegal except combinations of farmers and stock raisers, was declared in violation of equal protection. This decision of the United States Supreme Court was widely approved at the time,[44] but the opposition to the decision has grown with the years. Cooperative selling agencies are now approved. Farmers and stock raisers would now be regarded as a separate class, requiring special privileges for their protection.

The principle of classification also permits a degree of segregation on the basis of race. There may be separation on railway trains, but there must be equality of accommodations. There may be separate schools, but equality of advantages. Gong Lum was a Chinese citizen of the United States and of Mississippi who was not permitted to enter the consolidated high school of her district, restricted to white children, but was compelled, if she attended a public high school, to attend one restricted to colored children of which there was none in her district. Was this equal protection? Chief Justice Taft said it was, but held that if there was no school for the colored in her neighborhood a different question would have been presented.[45] Yet the Kentucky law providing for segregation in city blocks was declared unconstitutional as violating equal protection.[46] Many feel, however, that the judicial decision was not the ultimate decision in settlement of the problem of race. Many advocate separation of races, with equality, fraternity, and justice.

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[1] Freund, E., *Standards of American Legislation*, p. 144: "The juristic treatment of constitutional law is almost exclusively concerned with the checks on governmental power worked out by the courts upon the basis of very general clauses without very definite meaning."

[2] Pound, R., *The Spirit of the Common Law*, p. 198, on the freedom of contract, comparing the year 1886 with 1921.

[3] Ogg and Ray, *Introduction to American Government*, p. 616.

[4] *Ibid.*, p. 617.

[5] Freund, E., *op. cit.*, p. 220.

[6] Mott, R. L., *Due Process of Law*, p. 261. State Bank v. Cooper, 2 Yerg. 599 (Tenn. 1831).

[7] Mott, R. L., *op. cit.*, p. 268. Lewis v. Webb, 3 Maine 326 (1825).

[8] Mott, R. L., *op. cit.*, p. 271.

[9] Chief Justice Dixon of Wis. in Durkee v. Janesville, 28 Wis. 464 (1871).

[10] Mott, R. L., *op. cit.*, p. 267.

[11] Ogg and Ray, *op. cit.*, pp. 595, 596.

[12] Barbier v. Connolly, 113 U. S. 27.

[13] Mott, R. L., *op. cit.*, p. 275.

[14] C. B. & Q. v. Chicago, 166 U. S. 226. Hall, J. P., *Constitutional Law*, p. 200.

[15] Smyth v. Ames, 169 U. S. 466.

[16] Mott, R. L., *op. cit.*, p. 277.

[17] Truax v. Corrigan, 257 U. S. 312 (1921).

[18] 100 U. S. 303.

[19] Carter v. Texas, 177 U. S. 442.

[20] Hall, J. P., *op. cit.*, p. 130.

[21] *American Year Book* for 1925, p. 650: "Women are eligible for jury service in 21 states."

[22] Hall, J. P., *op. cit.*, p. 130.

[23] Frost v. Corporation Commission, 278 U. S. 515 (1929).

[24] Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Association, 276 U. S. 71 (1928).

[25] Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456 (1924).

[26] Fort Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387 (1927).

[27] Liggett Co. v. Baldridge, 278 U. S. 105 (1928).

[28] Quaker City Cab Co. v. Pennsylvania, 277 U. S. 376 (1928).

[29] Hanover Fire Insurance Co. v. Harding, 272 U. S. 494 (1926).

[30] Truax v. Raich, 239 U. S. 33.

[31] Hughes, C. E., *The Supreme Court of the United States*, p. 226.

[32] Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392 (1927).

[33] Farrington v. Tokushige, 273 U. S. 284 (1927).

[34] Porterfield v. Webb, 263 U. S. 225 (1923).

[35] Terrace v. Thompson, 263 U. S. 197 (1923).

[36] Webb v. O'Brien, 263 U. S. 313 (1923).

[37] Frick v. Webb, 263 U. S. 326 (1923).

[38] 118 U. S. 356.

[39] Willoughby, W. W., *On Constitutional Law*, Vol. I, p. 552. Williams v. Miss., 170 U. S. 213.

[40] Giles v. Harris, 189 U. S. 475.

[41] Guinn v. United States, 238 U. S. 347 (1915). Myers v. Anderson, 238 U. S. 368 (1915).

[42] Wuchter v. Pizzutti, 276 U. S. 13 (1928), the dissenting opinion of Justice Brandeis.

[43] Hall, J. P., *op. cit.*, p. 136.

[44] Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

[45] Gong Lum v. Rice, 275 U. S. 78 (1927).

[46] Buchanan v. Warley, 245 U. S. 60 (1917).

CHAPTER XXV

SUNDRY SUBSTANTIVE RIGHTS

1. *Review of Equal Protection of Law*

We have seen that there are two lines of decisions upon the relation of due process to equal protection. According to one line due process is held to be a generic right to justice which includes the specific right to equality.[1] According to another line the rights to due process and to equal protection are distinct rights, the right to equality adding something not included in the right to justice. The more recent decision in Truax v. Corrigan [2] establishes the doctrine that the rights to due process and to equal protection are distinct from each other. The right to due process limits both the federal and state governments; the right to equal protection is binding only upon the states.

When the right to due process is regarded as a great, all-inclusive right to justice, it is apt to be interpreted as including the prohibition on bills of attainder and ex post facto laws, the prohibition on laws impairing the obligation of contracts, the prohibition on taking private property for public use without just compensation, also the prohibition on the denial to any person within the jurisdiction of the equal protection of the laws, and an indefinite number of other constitutional protections. Furthermore there is the temptation to make due process override any law or constitution, state or federal, that violates the law of nature, the law of God, or an ideal system of ethics. Accordingly a notable writer upon law asserts that the courts have the power and duty of invalidating the protective tariff,[3] and all laws imposing inheritance taxes.[4] He would have them reverse their decisions on a certain question though there has been general uniformity in both state and national courts for a period of seventy years.[5] His doctrine is that *stare decisis* applies only when decisions have been correct.[6] Another able lawyer writes to prove that the 18th Amendment is unconstitutional because it invades the personal liberty of the competent man, which no government on earth can do.[7] He insists that the courts should declare it void. It is a relief to turn from such chimerical doctrines to the actual decisions of the courts. Our judges are earnestly striving to give justice and to retain in the law a reasonable degree of certainty.[8] The concept of justice is not static, but changes slowly from age to age. The ideals of the world have changed from the free struggle for all, as held in the period of Classical Liberalism, to humanitarian ideals of mutual helpfulness. Justice is not now defined by great juristic authorities in terms of the jungle but of brotherhood.[9] Our judges are sometimes slower than the legislators to catch these great ideals of our age,[10] and therefore any tendency to restrict the meaning of due process gives greater liberty to the legislators to enact laws which reflect the altruism of our time.

The concept of equal protection is not so vague and elastic as that of due process when interpreted as substantial justice. It was adopted in the year 1868 for a very definite purpose, to give equality to the freedmen. But there was an equally definite purpose not to limit this new protection to one race. Though the amendment was intended to give Congress plenary power over the whole range of rights,[11] there was no thought of repealing the land laws, or the immigration laws, or naturalization laws, or to relieve soldiers and sailors from their obligations. It was not intended to end the wardship over Indians or children or other persons whose actual condition required special protection. It was intended to remove restrictions which were designed to keep any class of persons in a condition of poverty, dependence, or arrested development, restrictions which prevented any class from rising to well-being, affluence, and power, as a reward of their own industry and enterprise. The concept of equality, however, has not meant the same to all from 1868 to the present. Some held the philosophy of Classical Liberalism united to a high idealism. They tried to make negroes by law the absolute equals of whites, as if the two races did or could constitute a homogeneous community. They tried to give the negroes absolute equality in law, and their policy was to let them go down to a crushing defeat by their inexperience and immaturity.[12] Men of the humanitarian school on the other hand would say, "These freedmen are our brothers in one community, and their undoing will endanger the whole community. Therefore they must be guarded and helped; their difference from the whites must be recognized, so that they may rise with pride in their race and with hearty loyalty to the whole community." [13] The same conflict of ideas occurs again over questions of sex, labor, health, and education. Thus the National Woman's Party would amend the constitution to assure men and women equal rights. They unite Classical Liberalism with idealism. A program more in accord with modern thought would be the repeal of all unjustly repressive laws and the enactment of more protective laws for women.[14]

Again variant views clash in the treatment of corporations. Frontiersmen in the exuberance of their individualism hate corporations, and delight to beat them down, as if they were wild beasts to be killed and devoured. Men of this spirit do not see the debt of modern civilization to corporations. Yet as persons, and even as citizens in some degree, corporations are obtaining more protection, not yet reaching equal protection.[15]

We have seen that due process was at first an adjective right, and possibly nothing else, but it has become principally a substantive right, limiting Congress as well as state legislatures. We saw in the last chapter that equal protection is, in a minor degree, an adjective right but predominantly a substantive right, limiting all departments of state government. Some of the rights to be considered in this chapter are also adjective rights, but it is in the character of substantive rights that their importance really lies. This is particularly true of the protections against bills of attainder and ex post facto laws.

2. *Prohibition on Bills of Attainder*

The provisions of the federal constitution as limitations on Congress are as follows: "No bill of attainder . . . shall be passed" (Art. I, Sec. 9); and, "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the persons attainted" (Art. III, Sec. 3). The provision made a limitation on the states is: "No state shall . . . pass any bill of attainder" (Art. I, Sec. 10).

According to the feudal laws of England when a subject committed treason or felony, his blood, as of an attainted person, was so corrupted in the eye of the law that he could not inherit lands from others, or could others from him. In a case of treason there was permanent forfeiture of his lands to the king, but in case of felony there was forfeiture to the king for a year and a day and escheat to his lord.[16] As the laws of Parliament created new kinds of felony, there was felt to be a great hardship to the wives and children of offenders. So from the time of Henry VIII there were many laws mitigating this hardship, till finally in 1870 a law was passed that no treason or felony is to cause any attainder or corruption of blood or any forfeiture or escheat.[17] This bit of history appears to give the key for the interpretation of the provision of the constitution that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."

On the 11th of November, 1640, the Earl of Strafford, the favorite minister of Charles I, was impeached for treason. But the law of treason was limited to levying war against the king or compassing his death, and did not include conspiracy against the liberties of the people. Therefore the trial before the High Court of Parliament was suddenly interrupted, and the House of Commons fell back upon the extreme measure of bringing in a Bill of Attainder which passed both houses and received the king's signature much against his will.[18] Says the historian, Green: "Strafford's course, whether it fell within the Statute of Treason or no, was from the beginning to end an attack on the freedom of the whole nation. In the last resort a nation retains the right of self-defense, and a Bill of Attainder is the assertion of such a right for the punishment of a public enemy who falls within the scope of no written law."[19] A bill of attainder is "a legislative enactment declaring the attainder of one or more persons."[20] A bill of pains and penalties is "a special act of the legislature declaring a person guilty of some offense, without any conviction in the regular course of judicial proceedings, and inflicting upon him some punishment less than death."[21] A bill of attainder inflicted death. The prohibition of the constitution upon Congress and the states included under the term bill of attainder both the strict bill of attainder and the bill of pains and penalties.

There were a number of such bills passed by Parliament during the revolution against Charles I, and our state legislatures passed bills of a similar nature during the American Revolution. A law of Massachusetts, passed in 1778, names more than three hundred leading personages who had left the province and joined its enemies. It prohibited their return.[22] By other acts their property was seized,[23] and when they returned after the war to claim their estates, or sent their agents, in most cases they received slight consideration.[24] One of these acts of banishment and confiscation was passed by the legislature of Georgia in 1782. The plaintiff in the case of Cooper v. Telfair,[25] which was decided by the United States Supreme Court in 1800, claimed that he had never been tried, convicted, or attainted of treason and that the legislative act was repugnant to the constitution of Georgia. The court decided that the constitution of Georgia did not expressly interdict a bill of attainder and confiscation, and an implied prohibition ought not to be found by the court, for the presumption is always in favor of the validity of a law. Justice Paterson said: "The power of confiscation and banishment does not belong to the judicial authority, whose process could not reach the offenders; and yet it is a power that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature that it cannot be divested or transferred, without express provision of the constitution."

Mr. Justice Chase remarked that, "There is . . . a material difference between laws passed by the individual states during the Revolution and laws passed subsequent to the organization of the federal constitution."[26] He doubted that the prohibitions of the federal constitution could be employed to invalidate state laws previously enacted. Evidently by the year 1787 there had developed a strong sentiment against resort to bills of attainder in the future. Yet after the Civil War there was a similar bitterness of feeling against persons who had made war upon the union. Bills were passed both by Congress[27] and state legislatures[28] which bore some mild resemblance to bills of attainder in that they inflicted penalties by legislative act and not by judicial process. By a divided court they were declared unconstitutional.[29] Whether they were so or not, their policy was reprehensible, for the wounds of civil strife, where the contestants are men of honor and patriotism, are not healed by harshness but by magnanimity and forbearance.

3. *Prohibition on Ex Post Facto Laws*

Closely allied to bills of attainder are ex post facto laws. Both are denied to Congress and the state legislatures by the federal constitution. The interpretation given in America to the former somewhat enlarges their common law meaning, while the interpretation of the latter is more restricted than the literal meaning of the words would indicate. The legislature of Virginia in 1778 passed a so-called bill of attainder against Philips and his band of outlaws. The law declared them attainted unless they surrendered to justice within a certain time. They were taken after the time had expired, and were "brought before the general court to receive sentence of execution pursuant to the direction of the act." The attorney-general and judges were reluctant to follow the provisions of the act, and Philips and his band were tried, convicted, and executed under the common law.[30] This bill of attainder, in that it contemplated court action and was a criminal retroactive act, had the marks of an ex post facto law. Bills of attainder are extreme measures, and resort to them is made only in time of revolution, but ex post facto laws contemplate the usual court procedure, and so acts passed in profound peace are challenged as ex post facto laws. The medieval Latin words employed would naturally be interpreted as retroactive legislation, but in the practice of the mother country and in the understanding of the framers it was restricted to retroactive criminal laws.[31] Indeed the interpretation of the courts has still farther restricted the clause to certain kinds of retroactive criminal laws.

Mr. Justice Chase classified these ex post facto laws as (1) those which created the crime after the event, (2) those which aggravated the crime, (3) those which increased the punishment, and (4) those which changed the rules of evidence in order to convict the offender.[32] An additional ex post facto law was recognized by a later decision of the same court, that of Thompson v. Utah.[33] A law of Utah changed the number of jurors in a criminal trial from twelve to eight. In behalf of one charged with crime committed before the passage of the new law, it was claimed to be ex post facto as applied to him. The court accepted this view, for the law "alters the situation of the accused to his disadvantage."

Both of these prohibitions are procedural provisions, but fundamentally they are substantive. Bills of attainder and ex post facto laws are condemned because they transform what is regarded as a great moral offense into a crime which was not a crime when the offense was committed. No legislature and no court should do this. In principle retroactive legislation is unjust. In criminal law it is prohibited,[34] but sometimes in civil law it is necessary and is permitted.[35]

4. *The Prohibition of Slavery and Involuntary Servitude*

Section I of the 13th Amendment reads as follows: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." In the case of Robertson v. Baldwin [36] the federal Supreme Court declared that the 13th Amendment was directed against slavery, as known formerly in this country, against Mexican peonage, and the Chinese coolie trade, but was not intended to introduce a novel doctrine with respect to military or naval enlistment, or the relation of parents and guardians to minor children. The court said that the contract of a merchant seaman had always been regarded as exceptional, and that a seaman could be compelled not to desert during the continuance of the voyage, the 13th Amendment not being intended to change this universal custom. But La Follette's Seaman's Act of 1915 abolished arrest and imprisonment as a penalty for desertion. The punishment provided for desertion is now forfeiture of effects on board and wages.[37] Seamen may demand one-half of wages earned at every port where the vessel loads or delivers cargo.[38]

Southern negroes are not always reliable in time of need in the cotton fields; therefore compulsory service to discharge debts was attempted.[39] But the court declared this to be peonage, based on the indebtedness of the peon to the master, a form of involuntary servitude and in violation of the amendment.[40] South Carolina attempted to establish imprisonment for breach of labor contract, but this too was declared to be involuntary servitude.[41]

During the participation of the United States in the Great War there were several cases where men drafted into the military service by the operation of the Selective Service Act claimed that the law was unconstitutional, as violating the provision against involuntary servitude. The California Supreme Court decided that the claim was utterly without merit.[42] Federal courts in similar cases came to the same conclusion.[43]

5. *The Right to Life, Liberty, and Property*

We have discussed the meaning of due process at considerable length as a protection against unlawful taking of life, liberty, and property, but the right to life, liberty, and property, as a substantive right in itself, we have not discussed. We have not defined these terms. Due process is important because life, liberty, and property and the right to them, are of greater importance. The association of these three valuable possessions with the means for their protection began in Magna Charta and has constantly recurred in other English documents and legal writings, such as Blackstone,[44] and is perpetuated in American constitutions. This recurring association should assist in the interpretation of the terms.

The right to life is so elemental that it need not be enlarged, except to quote from Freund that: "It is almost a matter of course that the police power does not extend to the taking of human life. Not even the most imminent danger of contagion would justify the killing of a man, whereas it justifies the killing of animals. An exception from this elementary principle is however apparently presented in the case of justifiable homicide by an officer of the peace." [45]

In the historic association of these terms liberty has meant liberty of the person, freedom from physical restraint,[46] but American courts have broadened the meaning of both liberty and property, so that they overlap. Thus in Allegeyer v. Louisiana [47] the United States Supreme Court said: "The liberty mentioned in the 14th Amendment means not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties, to live and work when he will, . . . to enter into all contracts which may be proper. . . ."

"The right of property in an individual," says Stephen, "may be defined as consisting in the free use, enjoyment, and disposal of his belongings, according to the law; and it may otherwise be described as the right or principle by which one man claims and exercises dominion over certain external things, to the exclusion of all other individuals therefrom."[48] This appears to be the natural meaning of property as the term is employed in the 5th and 14th Amendments. Our courts have broadened the meaning of property in these amendments. The Illinois Supreme Court has defined property as follows: "The right of property is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any industrial pursuit which the citizen . . . may choose to adopt. . . . The property which each one has in his own labor is the common heritage. And as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed . . . is necessarily included in the constitutional guaranty."[49] Both of these definitions, the judicial definitions of liberty and property, are now stated so broadly that a wide range of state and federal laws may be declared invalid as arbitrary and unreasonable.

The right to contract is derived from the rights to liberty and property.[50] Two cases in 1886, one in Pennsylvania[51] and one in Illinois,[52] were the first to lay down the principle of entire freedom of contract between labor and capital. The right to contract was held also to be a property right. Based on the right to contract the Illinois Supreme Court in 1895 declared invalid an eight hour law for women in factories.[53] In 1908 the United States Supreme Court upheld the Oregon ten hour law for women workers.[54] Then the Illinois legislature passed a similar law, and the state court reversed its previous decision, saying, "What we know as men, we cannot profess to be ignorant of as judges."[55] How valuable is the right to contract, the right of a poor, distraught woman to enslave herself!

6. *Rights Guaranteed by the Comity Clause*

Section 2 of Article IV of the federal constitution reads as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." These cryptic privileges and immunities are guaranteed to citizens of one state going into another state. The provision relieves such persons from the disabilities of alienage in the states to which they go. They can purchase and enjoy all kinds of property, including land. No license can be required of them, not required of citizens of the state, though such licenses may be required of most corporations entering a state from another state. The citizen of another state is exempt from higher taxes than those imposed on the citizens of the state entered.[56]

The comity clause, however, does not bestow political or proprietary privileges. Neither does the visitor take with him the privileges of his own state, but he is guaranteed the ordinary civil privileges of the state into which he goes.[57]

7. *Rights Guaranteed by the Full Faith and Credit Clause*

The laws of the states have no operation in other states. The relations of the states with one another are regulated by the rules of Private International Law, or the Conflict of Laws, except where there are provisions otherwise in the federal constitution. One of these provisions is found in Article IV, Section 1, to this effect: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." This clause has been held to apply only to civil judgments and decrees, and not to the enforcement of penal laws. Provision is made in the same article for the extradition of persons charged with crime.

Perhaps the most important applications of this clause are in connection with marriage and divorce. Gretna Green and Elkton have their sequel in Reno. It has been decided that where a matrimonial domicile has been established in a state and the parties separate, one going to another state, the other remaining and suing for divorce, such a divorce, if granted, must receive full faith and credit in all other states.[58] But if the party remaining does not sue for divorce, and the party going to another state sues for a divorce in that state, such divorce, if granted, need not receive full faith and credit in the other states. A marriage is wrecked and straight into the wreck come at full speed the evils of alimony, bigamy, illegitimacy, poverty, and shame.

8. *Limited Right Against Discrimination in Suffrage*

The 15th Amendment very properly did not give the right of suffrage to the negroes, but it did provide that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." The 19th Amendment follows the some form in prohibiting the denial or abridgement "on account of sex."

Unfortunately the reconstruction laws, forced on the Southern States, did give the unprepared negroes the right to vote.[59] This misguided idealism led to fraud and intimidation for the purpose of restoring the responsible elements of society to power. When they had gained control they revised the constitutions. The grandfather clauses of some of these constitutions in spirit and fact violated the 15th Amendment. Finally in 1915 the grandfather clauses of two constitutions, Oklahoma[60] and Maryland,[61] were declared unconstitutional. At that time an ex-confederate officer, as Chief Justice, presided over the United States Supreme Court, and the chief magistrate of the nation was a native Virginian.

9. *The Right of Protection from State Law, Impairing the Obligation of Contracts; and the Right of Protection from the Federal Government, Taking Private Property for Public Use without Just Compensation*

These two rights of outstanding consequence properly belong in this chapter, one found in Article I, Section 10, and the other in the 5th Amendment, though it has also been found by implication in the 14th Amendment. These rights may best be treated in a more extended presentation of their counterparts, the police power and the right of eminent domain. Thus we will study these remaining fundamental rights of the citizen in the opposite rights of society as against the individual citizen.

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[1] People v. Max, 70 Colo. 100 (1921).

[2] Truax v. Corrigan, 257 U. S. 312 (1921).

[3] Abbot, E. V., *Justice and Modern Law*, pp. 148 ff.

[4] *Ibid.*, pp. 26 ff.

[5] *Ibid.*, pp. 270 ff. His able criticism of the Farwell case.

[6] *Ibid.*, p. 6. Pollock, F., *The First Book of Jurisprudence*, p. 341 (*contra*).

[7] Norton, T. J., *Losing Liberty Judicially*, pp. 99–105.

[8] Hughes, C. E., *The Supreme Court of the United States*, pp. 195 ff.

[9] Pound, R., *The Spirit of the Common Law*, pp. 195 ff.

[10] *Ibid.*, p. 214.

[11] Mecklin, J. M., *Democracy and Race Friction*, p. 225; quoting Garfield on the purpose of the amendment and its relation to the Civil Rights Act.

[12] *Ibid.*, pp. 260 ff.

[13] *Ibid.*, pp. 265–270.

[14] *American Year Book* for 1925, p. 649.

[15] Mott, R. L., *Due Process of Law*, p. 594.

[16] Stephen's *Commentaries*, Vol. I, pp. 251 ff.

[17] *Ibid.*, Vol. I, pp. 253 ff.

[18] Gardiner, S. R., *The Constitutional Documents of the Puritan Revolution*, pp. xxix–xxxi, 156 ff.

[19] Green, J. R., *History of the English People*, Vol. III, p. 194.

[20] Johnson's *Cyclopedia*, "Bill of Attainder," Vol. I, p. 623.

[21] *Ibid.*, "Bill of Pains and Penalties," Vol. I, p. 625.

[22] *Colony and Province Laws*, p. 818 (Sept. 1778).

[23] *Ibid.*, pp. 807 ff. (1777).

[24] Hart, A. B., *Formation of the Union*, p. 116. Hutchinson, P. O., *Diary and Letters of Thomas Hutchinson*, Vol. II, pp. 390–393.

[25] Cooper v. Telfair, 4 Dallas 14 (U. S. Sup. Ct. 1800).

[26] *Ibid.*

[27] Ex parte Garland, 4 Wall. 333.

[28] Cummings v. Missouri, 4 Wall. 277. Pierce v. Carskadon, 16 Wall. 234 (1872).

[29] Cooley, T. M., *Constitutional Limitations*, p. 320.

[30] Haines, C. G., *The American Doctrine of Judicial Supremacy*, pp. 77 ff.

[31] Cooley, T. M., *op. cit.*, pp. 321 ff. Hall, J. P., *Constitutional Law*, pp. 92 ff.

[32] Calder v. Bull, 3 Dallas 386.

[33] 170 U. S. 343.

[34] Beazell v. Ohio, 269 U. S. 167 (1925). It was decided that any statute which punishes as a crime an act previously committed which was inno-

cent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives the one charged with a crime of any defence available according to law at the time when the act was committed, is prohibited as ex post facto. But statutory changes in the mode of trial or the rules of evidence which do not deprive the accused of a defense, and which operate only in a limited and unsubstantial manner to his disadvantage are not prohibited as ex post facto laws.

[35] Hall, J. P., *op. cit.*, p. 153.

[36] 165 U. S. 275.

[37] *Compiled Statutes to 1918*, Sec. 8380.

[38] *Ibid.*, Sec. 8322.

[39] Mecklin, J. M., *op. cit.*, p. 262.

[40] Clyatt v. United States, 197 U. S. 207.

[41] Ex parte Drayton, 153 Fed. 986.

[42] Claudius v. Davis, 165 Pac. 689 (Calif.).

[43] Arver v. United States, 245 U. S. 366. United States v. Sugar, 243 Fed. 423.

[44] Cooley's *Blackstone*, Book I, pp. 129–140.

[45] Freund, E., *Police Power*, p. 475, Note.

[46] Cooley's *Blackstone*, Book I, p. 134.

[47] 165 U. S. 578.

[48] Stephen's *Commentaries*, Vol. II, p. 88.

[49] Braceville Coal Co. v. People, 147 Ill. 66.

[50] Commons and Andrews, *Principles of Labor Legislation*, p. 222.

[51] Godcharles v. Wigeman, 113 Pa. St. 431.

[52] Millet v. People, 117 Ill. 294.

[53] Ritchie v. People, 155 Ill. 98.

[54] Mueller v. Oregon, 208 U. S. 412.

[55] Ritchie v. Wayman, 244 Ill. 509.

[56] Hall, J. P., *op. cit.*, pp. 335 ff.

[57] *Ibid.*, pp. 338 ff.

[58] Haddock v. Haddock, 201 U. S. 562. Schofield, H., *Essays on Constitutional Law and Equity*, Vol. I, pp. 153 ff.

[59] Mecklin, J. M., *op. cit.*, pp. 236 ff.

[60] Guinn v. United States, 238 U. S. 347 (1915).

[61] Myers v. Anderson, 238 U. S. 368 (1915).

CHAPTER XXVI

STATE POLICE POWER: THE PRIMARY SOCIAL INTERESTS

1. *Prohibition on State Law Impairing the Obligation of Contracts*

In the preceding chapter consideration of two remaining fundamental rights of citizens was postponed to more detailed examination in the presentation of two great rights of society as against citizens. The first of these rights of citizens and persons is found in Article I, Section 10: " No state shall . . . pass any . . . law impairing the obligation of contracts." This is a limitation upon all state bodies which exercise legislative or quasi-legislative power. They may not lessen the obligation of a contract; they may not weaken the means to enforce a contract. It is not a limitation on purely administrative or judicial powers.

In the period of Revolution there was legislative interference with business contracts which greatly alarmed the commercial classes. Such interference is characteristic of all protracted wars. It was the purpose of this provision of the constitution to protect these business contracts which were made by the consent of the parties and which were legal at the time made.[1] Thus a contract to pay 6 per cent interest on a note, given by a private party to a private party, cannot be amended by state legislation, reducing the interest to 5 per cent. This provision of Section 10 was not made applicable to Congress,[2] for in war or crisis of corresponding impelling necessity such a prohibition might cripple the power of Congress to pass laws to meet the actual condition of the country.[3] Yet this prohibition, when limited to the states, cannot be absolute, for contracts, permissible at the time when made, may become so harmful to society, that they must give way to public necessity. Thus it may become an offense to meet the terms of a legal contract to deliver a thousand bushels of rye at a distillery.[4] It may become an offense to deliver even ten barrels of flour to a dealer, which was legally contracted for, if at the time of delivery it would be a violation of the federal food regulations, enacted in war time.[5] Congress acts under its powers to wage war and to enforce the prohibition on the manufacture and sale of intoxicating liquors. The states may pass similar acts under their general regulatory or legislative power in times of similar compelling necessity.

In the famous case of Fletcher v. Peck[6] (1810) Chief Justice Marshall held that a legislative grant of land was an executed contract which the state could not repeal. This decision was received by the people of that day with strong protest, for a legislative grant was not an ordinary contract between private persons, yet it was a just decision, though not a strictly correct one, when given to protect innocent third parties who had purchased land from grantees, even when the grantees had obtained their lands by bribery and fraud. But when this prohibition is thus extended by judicial interpretation beyond its original purpose, it cannot be absolute, for past land grants when made in disregard of a public trust, and the land has not been transferred to innocent third parties, may be revoked by the exercise of the same general legislative power. The case of Illinois Central R. R. v. Illinois[7] illustrates this principle. The court would not hold that the legislature had tied its hands for the future as to privileges not taken, but held that improvident contracts even of the legislature may be repealed by subsequent legislative act.

But the doctrine of Marshall in the case of Dartmouth College v. Woodward[8] was received with consternation by the people of his time.[9] It was declared in 1819, nine years after the decision in Fletcher v. Peck. It was that the college charter, granted in colonial times, was a contract forever binding upon the legislature, for it was protected by the contract clause of the federal constitution. This charter was not a contract between private parties, but was a legislative grant. Yet the contract clause of the constitution was extended to protect this charter.

2. *Extension of the Doctrine of the Dartmouth College Case to Ordinary Corporations Organized for Profit*

When this doctrine is applied to eleemosynary trusts, as in this case, it does seem just that the trusts should be protected. Yet in the course of many years such trusts may become detrimental to the community. England has therefore provided for the diversion of such endowments to new trusts in accordance with modern needs.[10] But when this doctrine is applied to private companies, organized for profit, it becomes positively dangerous.[11] Suppose a company is chartered with perpetual tax exemption. This is an improvident grant, but such a charter was held by Marshall to be a contract, forever protected from impairment.[12] Suppose there is a charter right to fix rates, given a public utility, but experience teaches that there must be governmental supervision of rate fixing.[13] Suppose the legislature charters a company to make beer at a time when it is legal for private parties to do this, but later legislative policy changes to the prohibition of the manufacture of beer.[14] Suppose the legislature charters a company to erect a fertilizing establishment out in a swamp at some considerable distance from a city, but the city grows to the plant, and the manufactory is a menace to the health of the neighborhood.[15] Now if natural persons may be subject to all the regulative laws of the legislature, but juristic or artificial persons may do anything within the terms of their charters, the power of the legislature to pass laws for the general welfare is seriously crippled. Therefore it was necessary to discover in the inherited law some doctrine which might be read into the reserved powers of the state legislature, for the purpose of limiting this new doctrine which the court had read into the contract clause of the constitution.

3. *Content of the Police Power Before the Dartmouth College Decision*

Blackstone, after treating of four species of offenses against the commonwealth, including offenses against public justice, offenses against public peace, offenses against public trade, and offenses against public health, adds a fifth species, offenses against public police. He says: "By the public police . . . I mean the due regulation and domestic order of the kingdom; whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous as it comprises all such crimes as especially affect public society, and are not comprehended under any of the other four species."[16] Here in Blackstone was the suggestion of a vague, general power for the protection of society as against the over emphasis upon the rights of individuals. Blackstone had great influence in America. The English common law was our own. We accepted the individualistic philosophy of England. Much was made of the rights of men, little of the rights of society. But when it was necessary to protect society as against individuals we looked to England for precedents.

4. *Extension of the Police Power to Meet the Unfortunate Results of the Dartmouth College Case*

The work of Chief Justice Marshall was largely to harmonize representative government with property rights, with vested interests. He went too far in a good work. In the generation following him there was a marvelous expansion westward, and the development of canals and railroads. To a great extent it was corporate activity, though not on the grand scale of later years. The states were more active in this development of internal improvements than Congress. It fell to the state legislatures to regulate public utilities and promote business in the interest of general welfare. But the Dartmouth College decision stood in the way. One expedient to remove the obstruction was to amend the state constitutions, giving the right to amend or repeal charters, but that would apply only to charters granted after the adoption of such amendments. Another expedient was the assertion and expansion of the police power. The legislatures asserted the power to pass laws to protect the peace, safety, health, and morals of the states. The courts, recognizing the necessity of such legislation, sustained such laws as not being in violation of the contract clause of the federal constitution. The courts decided that all persons, whether natural or corporate, were alike subject to such police regulations. Furthermore the courts strictly construed charters in favor of the public, so as to sustain laws passed by the legislatures. If possible they refused to recognize that there was a contract or vested right. So finally the result was very much as if there had been no Dartmouth College case at all. At last there was little constitutional difference between corporations and individuals so far as the application of the police power on the one hand and the protection of vested rights on the other are concerned. All persons are subject to the police power and all property is fairly protected.[17]

5. *Definition of Police Power Given by the United States Supreme Court in the Slaughter House Cases*

After the Dartmouth College decision Marshall himself in Gibbons v. Ogden[18] (1824) recognized that the states possess the police power. Chief Justice Taney in the License cases[19] (1846) greatly emphasized and enlarged this power. Finally in the Slaughter House cases[20] (1873) the United States Supreme Court in sustaining a state law gave a definition of what the police power meant in their time. They said: "It is much easier to perceive and realize the existence and sources of it than to mark its boundaries or prescribe limits to its exercise. This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of the social order, the life and health of the citizens, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." This vague doctrine has been effectually and fairly applied by the United States Supreme Court, with some lamentable exceptions. There has been some dissatisfaction with the lower federal courts. But the rising clamor against the courts, in relation to the police power, is directed largely against the state courts.

6. *The Conflicting Narrow Definition of the Police Power by Some State Courts*

While the state courts recognize that, " All property is held subject to those general regulations which are necessary to the common good and general welfare," [21] yet when they apply this vague and general doctrine, they refuse to permit the legislatures to determine finally what is necessary, and insist that there are limitations on the action of the legislatures. These limitations they find in the precedents of their own state courts. These precedents may be mere dicta, deliverances upon what the legislature could or could not do. These declarations may have been made in the early days when modern conditions did not obtain. The state courts therefore have a strong tendency to limit the competency of the legislature to the bounds within which laws were passed and sustained in the early days of the state. Anything that does not clearly fall under some precedent they are apt to refuse to sustain as a valid exercise of the police power. Though they refuse to define the police power they do not hesitate to say that laws which are sustained in other states and sustained by the United States Supreme Court are not valid exercise of the police power. They hold that such acts violate due process, though they refuse to define due process, and the courts of other states and of the United States may find these laws not to violate due process. Thus the police power in the early days was employed in opposition to the contract clause as unduly extended, but now the police power contends with due process as also unduly extended.

7. *Definition of Police Power as Internal Public Policy.*

What working definition shall we find of this vague power which is so important in America? We are clear as to the war power, that power by which every energy may be mustered in the maintenance of our national existence. We feel the burden of the taxing power, that power which may take every dollar for the needs of government. After the police power we will consider the power of eminent domain, the right of the government to take private property for public purpose upon making just compensation. This police power, which we are now considering, is the power of public welfare or internal public policy. Had we not better define it for short as internal public policy?[22] The object of the police power is the improvement of social and economic conditions affecting the community at large, with a view to bringing about the greatest good of the greatest number. It is internal policy as distinguished from external policy. Internal policy is policy, and belongs therefore to the governor and legislature, not to the courts. When the courts decide upon pure questions of policy they are not courts but political organs, policy-framing organs, legislative organs. This was never intended.

8. *Limitations on the Police Power*

The state constitutions contain limitations on the legislatures. These limitations should be strictly enforced — by the legislatures on themselves and by the people at the polls.[23] The federal constitution contains limitations on Congress. These limitations should be enforced — by Congress on itself and by the people at the polls. The federal constitution also contains limitations on the states. It will not do to leave a constitution or law made by the whole country to the sole enforcement of the people of a state who may not desire its enforcement. Therefore the courts, both federal and state, may properly enforce these limitations by declaring state laws unconstitutional when they clearly violate the federal constitution. State courts will do well to follow the statesmanship and liberality of the United States Supreme Court when it is at its best, when it gives a generous recognition of state police power.

9. *Methods of Police Power, Including Restraint, Regulation, and Prohibition*

The war power conscripts a man for military service; the taxing power takes possibly 60 per cent of his income or more. The power of eminent domain builds a railroad where his ancestral homestead had resisted the storms of a hundred years. So the police power may resort to many methods to affect its purposes. It may fine a man or send him to jail for attempting to create a monopoly. The power to punish is a familiar method of exercising restraint. Or the power may be exercised by the establishment of rules by which all sorts of pursuits are regulated. Thus the legislature establishes a legal rate of interest, sets railroad tariff rates, determines the number of hours of women workers, requires safety appliances, or establishes a standard purity for milk. It may regulate an admitted evil by license, or it may raise the license fee for the purpose of curtailing the evil, or it may prohibit the evil altogether. The power to employ taxation solely for police power purposes has been denied by some recent cases which have been justly and severely criticized.[24] These are only a few of the numberless methods which may be employed by the police power.[25]

10. *Distinction Between Police Power and Eminent Domain*

In the exercise of the power of eminent domain there is a taking of property which is of value to the government. For this there must be just compensation. In the exercise of the police power there is no appreciable taking; the title remains where it was, but there may be the practical destruction of property which is harmful to the people. In the one case the public becomes the owner of the property which has a definite value. In the other case the public may lose a source of income in the destruction of a business which formerly had paid large taxes, license fees, or fines, and there may be no gain that can be measured in dollars and cents.[26]

Generally the kinds of business which are destroyed by the police power are those which have always been considered dangerous to society. Men have invested their money in a business which they knew is subject to regulation or prohibition. They assume the risk and count upon large gains to protect themselves. It matters not whether it is a saloon, a brewery, a race track, a gambling den, or a bawdy-house. They have all been subject to repression from the time of Hammurabi,[27] who reigned more than four thousand years ago and whose code has come down to us. Those who suffer loss from the exercise of the police power receive no compensation and should receive none.[28]

11. *The Primary Social Interests; Health, Safety, Order, and Morals*

While we define police power as that power charged with the care of internal public policy, and this definition may include a multitude of interests, yet some interests have an assured position in the police power, the degree of protection granted to others is controverted, and some interests are barely tolerated. There are interests which are not recognized at all, or have not been till recently. For example, esthetics has little or no recognition in the police power, but has some recognition in eminent domain. Thus regulations upon the height of buildings have been declared invalid when made purely for esthetic purposes as police regulations, yet the same regulations have been held valid under eminent domain, for then, of course, there was compensation. Much of the hideousness of American cities is due to this failure to recognize esthetics as a legitimate interest to be protected under the police power. But the primary interests of safety, health, order, and morals are securely established as legitimate police power interests. Indeed in some state courts the police power is limited to these four great interests.[29]

In the interest of public health the legislature may go so far as to prohibit the manufacture of oleomargarine.[30] Yet when the New York legislature regulated the hours of bakers the United States Supreme Court refused to recognize the law as a valid exercise of the police power.[31] Thus in the Powell case the court went to the farthest limit in the recognition of a law as a health measure. In our day we may feel that the court went beyond the limit and might better have declared the act invalid. But in the Lochner case the same court vetoed a health measure which brought upon the court universal criticism.[32]

Legislation in the interest of public safety is constantly increasing. The New Jersey statute requiring non-residents to designate the secretary of state as an attorney upon whom process may be served in any action caused by the operation of motor vehicles, has been sustained in principle[33] but invalidated for not positively providing for notice to be sent by the secretary to the party sued.[34] It was easy to correct this omission by legislation. The amplest exercise of the police power in the interest of safety is sustained by the courts.[35]

Legislation in the interest of order, that is, peace and security from crime, may be regarded as the most essential requirement in a civilized community. An example of a law sustained by the courts is the Illinois law forbidding the sale of deadly weapons except by persons duly licensed and to persons duly licensed.[36] Known thieves may be punished without reference to specific acts, and even in time of peace persons habitually found prowling around steamboat landings, court rooms, and other public places, may be punished.[37] Yet there are more constitutional limitations upon this phase of the police power than upon any other. In this the legislatures do not have so free a hand as in measures for health, safety, and morals.[38]

Legislation in the interest of morals is sustained by the courts more generally than even health measures. Georgia forbade the keeping of intoxicating liquor in excess of a given quantity in any place whatsoever. The court held that this was a question for the legislature to settle even though the law regulated the possession of liquor for personal use in one's residence.[39] Yet laws for the sterilization of criminals, which might be regarded as legislation in the interest of public morals, have been held constitutional in the state of Washington[40] and unconstitutional in New Jersey,[41] as a cruel and unusual punishment. Many of the high standards of Quaker and Puritan domination are giving way to standards introduced from Continental Europe, and the results are lamentable. But the moral standards of the present time in some respects are a distinct advance from those of our fathers. Laws of moral aspiration which are not enforced and cannot be, should be repealed, however great our regret. But it is the province of law to give a boost to a backward minority in the direction of moral progress. We must force our fellows and ourselves to be chaste and sober or we will all go down to bestiality and degeneracy.[42]

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[1] *The Federalist,* edited by H. C. Lodge, pp. 38, 279.

[2] The case of Missouri, K. & T. R. Co. v. Oklahoma, decided by the U. S. Supreme Court May 24, 1926, declares an order of the state corporation commission to impair the obligation of a contract and to deprive the company of property without due process. 271 U. S. 303 (1926).

[3] Knox v. Lee, 12 Wall. 457. Sinking Fund Cases, 99 U. S. 700.

[4] *U. S. Compiled Statutes to 1918,* Sec. 3115⅛ b, Aug. 10, 1917.

[5] *Ibid.,* Sec. 3115⅛ e, Aug. 10, 1917.

[6] 6 Cranch 87 (1810).

[7] 146 U. S. 387 (1892).

[8] 4 Wheat. 518 (1819).

[9] Freund, E., *Police Power,* pp. 360, 361.

[10] Stephen's *Commentaries,* Vol. III, p. 113.

[11] Dodge v. Woolsey, 18 How. 331.

[12] Gordon v. Appeal Tax Court, 3 How. 133. Piqua Branch of State Bank v. Knoop, 16 How. 369. Stone v. Miss., 101 U. S. 814.

[13] Shields v. Ohio, 95 U. S. 319. Parker v. Metropolitan R. Co., 109 Mass. 506. Ruggles v. Ill., 108 U. S. 526.

[14] Beer Co. v. Mass., 97 U. S. 25.

[15] Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659 (1878).

[16] Cooley's *Blackstone,* Book IV, p. 161.

[17] Freund, E., *op. cit.*, pp. 360–365.

[18] 9 Wheat. 1 (1824).

[19] 5 How. 504 (1847).

[20] 16 Wall. 36 (1873).

[21] Bouvier, J., *Law Dictionary,* "Police Power," Vol. II, p. 428.

[22] Freund, E., *op. cit.,* pp. 5, 6.

[23] Cooper v. Telfair, 4 Dall. 14 (1800).

[24] Bailey v. Drexel Furniture Co., 259 U. S. 20.

[25] Freund, E., *op. cit.*, pp. 23 ff.

[26] *Ibid.*, pp. 546–553.

[27] Johns, C. H. W., in Hastings' *Dictionary of the Bible,* "Code of Hammurabi," Extra Volume, pp. 584 ff.

[28] Freund, E., *op. cit.*, 557. An exception to the rule in that infected cattle, killed by the authorities, are paid for.

[29] *Ibid.*, p. 7.

[30] Powell v. Pa., 127 U. S. 678. Doubt cast on doctrine by Schollenberger v. Pa., 171 U. S. 1. John F. Jelke Co. v. Emery, 214 N. W. 369 (1927), invalidating the Wis. law prohibiting the manufacture and sale.

[31] Lochner v. New York, 198 U. S. 45.

[32] Freund, E., *op. cit.*, pp. 114 ff.

[33] Kane v. New Jersey, 242 U. S. 160. Hess v. Pawloski, 274 U. S. 352.

[34] Wuchter v. Pizzutti, 276 U. S. 13.

[35] Freund, E., *op. cit.*, pp. 110 ff.

[36] *Ibid.*, p. 94, sec. 93.

[37] *Ibid.*, pp. 96 ff.

[38] *Ibid.*, pp 87 ff.

[39] Samuels v. McCurdy, 267 U. S. 188.

[40] State v. Feilen, 126 Pac. 75 (1912); valid as punishment for rape.

[41] Smith v. Board of Examiners, 85 N. J. L. 46 (1913); holding law invalid. Smith v. Command, 204 N. W. 140 (1925); holding Mich. law valid — mental defectives. Buck v. Bell, 130 S. 516 (1925); holding Va. law valid. Osburn v. Thompson, 103 Misc. Rep. 23 (1918); holding N. Y. law invalid. Davis v. Barry, 216 Fed. 413 (1914); holding Iowa law invalid. Mickle v. Hernricke, 262 Fed. 689 (1918); holding Nevada law invalid. Williams v. Smith, 190 Ind. 526 (1921); holding Ind. law invalid — mental defectives. Buck v. Bell, 274 U. S. 200; upholding Va. law on appeal.

[42] Freund, E., *op. cit.*, pp. 172 ff.

CHAPTER XXVII

STATE POLICE POWER: ECONOMIC INTERESTS AND SOCIAL REFORM

1. *Review of Primary Social Interests*

We have seen that the state bills of rights set forth a long list of limitations on the state legislatures, so long and so comprehensive that almost any statute, however wise and necessary, may be challenged as violating some fundamental right. A law or ordinance prescribing vaccination is resisted as a violation of religious liberty, and so on down the whole list of rights examples multiply. The federal constitution also guarantees a long list of rights to citizens and persons which are limitations on the states. Some of these rights are very broad, such as the guaranty against the impairment of the obligation of contracts. The guaranty of equal protection of the laws is necessarily broad, and the guaranty of due process by interpretation has been made so broad as to embrace a whole bill of rights in itself. Lest state government should be unduly crippled the necessity of the general regulative power of the legislature has been asserted under the name of the police power, and under certain heads this police power has been generally recognized by the courts, namely, under the heads of order, health, safety, and morals.

We saw that the assertion of the police power was made as a check upon the resistance of persons who relied wrongfully upon the guaranty against the impairment of the obligation of contracts. An illustration of this check may be seen in a recent case coming to the United States Supreme Court from the state of Washington. A towboat company had entered into a contract for the hauling of logs at a special price. But this company was a common carrier, and as such was ordered by the state authorities to collect a higher rate than agreed upon by the parties. The injured party sued under the contract clause of the federal constitution, but under the decision the contract of the parties must yield to the higher interests of the state.[1] On the other hand we have a strange case coming up to the same court from Mississippi. That state pays a fee to its agents who investigate unpaid taxes and bring suits for their collection. Under a new law it is stipulated that when such an agent leaves office and his successor continues the suit, upon recovery the fee shall be divided between the two agents, but the court decides that the former law constitutes a contract with the former agent which is protected by the federal constitution.[2]

Under the head of order a recent decision of the Supreme Court sustained the California syndicalism laws under which a highly respected social worker, who had joined a branch of the Communist Labor party, was convicted, though she denied all intention to violate any law or indulge in terrorism.[3] Mr. Justice Brandeis dissented on the ground that there was no present danger warranting such a limitation on liberty in the name of the police power. The Kansas syndicalism act under which Industrial Workers of the World were convicted was, as applied to these people, declared to be an unreasonable exercise of the police power, as there was no allegation that the organization advocated violence or crime. Possibly the court record did not bring out adequately what is generally supposed to be the principles and practises of this order.[4] It is difficult to harmonize these decisions, but generally the English method of meeting radicalism is to be preferred.

Under the head of safety the legislature of Wisconsin passed a cab-curtain law for locomotives, which was sustained by the state court as a reasonable exercise of the police power and not an unconstitutional interference with interstate commerce.[5] This law and a Georgia law requiring automatic fire-doors on locomotives were annulled by the United States Supreme Court as interfering with interstate commerce.[6] They were recognized as good laws and proper for the states to pass if Congress had not already occupied the field. Answer is made that Congress had passed no laws upon the subject, and there were no administrative rulings. It is therefore asserted that as these laws did not conflict with federal laws or regulations, they ought to have been sustained.[7]

Under the head of health we have seen that the United States Supreme Court in the Powell case[8] sustained the Pennsylvania law prohibiting the manufacture of oleomargarine. Wisconsin at a later date passed an act forbidding the manufacture and sale of oleomargarine. The state supreme court takes judicial notice "that oleomargarine is a wholesome and nutritious food, and not harmful."[9] It was urged by counsel that the law was necessary to protect the dairy interests of the state. "To this the court replies that it had supposed that the state constitution was devised to prevent the legislature from doing just this sort of thing."[10] The court denied that one industry could be destroyed in aid of another. It is clear to the writer that this act was in violation of equal protection.

Under the head of morals an amusing or shocking decision has been made by the supreme court of Utah. The state constitution provides that, "The legislature shall not authorize any game of chance, lottery, or gift enterprise under any pretense or for any purpose." Yet a statute permitting betting at horse races was upheld as not violating this provision of the constitution. The opinion said: "If games such as horse racing, baseball, billiards, chess, and other games in which there is a basis for the exercise of judgment, learning, experience, and skill, must be classed as games of chance, even though there may be an element of chance, then we are unable to determine what constitutes a game of skill as contradistinguished from a game of chance."[11] Clearly the members of the legislature violated their oaths and the judges raised a dust cloud to hide the offense. The constitution plainly prohibited the legislative authorization of gambling, and the act permits it.

2. *Regulation of Domestic Relations, and the Care of Dependent, Delinquent, and Defective Persons*

The late Dean Hall[12] of the University of Chicago Law School said that the power to prescribe qualifications for marriage is probably far wider than any previous exercise of it in this country. There is a tendency now to exercise this power. In 1913 Pennsylvania and Wisconsin passed eugenic-marriage laws. These laws require a medical certificate of freedom from venereal disorder.[13] The Wisconsin law has been sustained. Some states have an evil reputation in the freedom of their divorce laws. The highest court of New Jersey has declared that a decree of divorce by a court in Nevada undertaking to dispose of the status in respect of marriage of spouses not resident in that state is a nullity, as that state is powerless either by act of legislature or decree of a court to fix the status of a person who is only a transient in that state and an actual resident of New Jersey.[14] A legislative act may abrogate all common law disabilities of married women, and such act is not invalid as destroying any vested right of the husband.[15] A state has the right to the custody of children and may detain them under a juvenile delinquent act without warrant.[16] In all these cases the police power of the state is great and unquestioned, though the exercise of the power has not been so general as in the recognized primary social interests.

Recent decisions on the subject of education seem to be at variance with principles supposed to be established. It is quite true that laws, enacted under the state police power, must be reasonable, for otherwise they will be held to violate equal protection, due process, or some other fundamental right. "But," says Freund, "even the courts which take a very liberal view of individual liberty and are inclined to condemn parental legislation would concede that such parental control may be exercised over children, so especially in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised."[17] He says the right of a parent is a power of trust " which may not only be checked in the case of manifest abuse, but the exercise of which may be directed by such rules as the legislature may establish as best calculated to promote the welfare of the child."[18] If it is conceded that the child is not *sui juris* but is the ward of the state, the legislature may determine upon his compulsory school attendance, the minimum education he shall receive,[19] the qualifications of his teachers, and why not even the extreme requirement that he shall attend a public school?[20] The Oregon school law appears to have been inspired by the Ku Klux Klan, but it was adopted as a popularly initiated measure by the required number of voters of the whole state. It is difficult to say that the majority of voters of a great state, who have displayed in their use of the initiative and referendum marked intelligence, have enacted a law so unreasonable that it must be invalidated as an abuse of the police power. A law may be unwise and yet not unconstitutional. In the case of Pierce v. Society of Sisters of Holy Names,[21] however, the law was invalidated under the due process clause, and the decision of the United States Supreme Court was very generally approved.

3. *Recognition of Comfort, Convenience, and Esthetics*

The police power is usually exercised for the primary social interests, but sometimes for public comfort, as directions for the heating of cars and the requirement that women at theatrical performances shall remove their hats.[22] The law of nuisance not only includes the unwholesome but the offensive. " It is no defense to the charge of a nuisance that the offensive industry is useful or conducted with great care."[23] Regulations for comfort more generally are exercised by municipal bodies than by state legislatures, and the courts always exercise greater freedom in reviewing the acts of quasi-legislative bodies than of sovereign legislatures. It is the rule that municipal ordinances must not be oppressive,[24] therefore wide liberty is taken in protecting vested interests from the abuse of police power. Thus a recent Seattle ordinance forbade the hawking of merchandise on private premises without the payment of a license fee of ten dollars a day. The regulation was declared an arbitrary restraint of property rights, but the neighbors may have felt that the ordinance was necessary to their comfort.[25]

Public convenience has a less assured position in the police power than public comfort. When a given regulation is made for public convenience and not for health, morals, or safety, the United States Supreme Court has questioned the propriety of ranging such regulations under the police power at all, yet the court recognizes such regulations as coming under a general governmental object. Therefore Professor Freund concludes that it is clearly an exercise of police power. Yet the public interest of convenience is not as urgent as that of health, therefore convenience does not justify similar interference with private rights. Regulations for public convenience apply to public utilities, to a business affected with a public interest, while an ordinance fixing the closing hours of a merchant would not in peace time be considered valid.[26]

When we pass from convenience to esthetics it is only in very recent years that we find in the police power any recognition of this important interest. It was the custom of the inspiring Dr. Rowe, in his lectures on this subject, to compare the uniformity and harmony of the general architectural plan of Paris with the lack of these characteristics in cities where individualism runs mad. There building lines and the height of buildings are not left to the individual caprice of the property owner. But the question if mere ugliness, not involving any consideration of decency, could be placed under police restraint had hardly advanced in this country beyond the range of tentative discussion. When legislation for the preservation of the architectural symmetry of a public square was sustained, it was on other ground than the protection against unsightliness.[27] Said Mr. Justice Peckham in upholding a Massachusetts law:

"Where the highest court of the state has held that there is reasonable ground for classification between the commercial and residential portions of the city as to the height of buildings, based on practical and not on esthetic grounds, this court will not hold that such a statute is unconstitutional." [28] Similarly legislation against billboards is sustained, not because billboards are an offense to the eye, but may be a fire hazard or harbor immoral conduct.[29] The Texas court has nevertheless held invalid the Galveston billboard ordinance of 1924 as retroactive and wanting in due process. Among the cases cited as authorities, no mention was made of the decision of the United States Supreme Court upholding such ordinances as Galveston had passed.[30] The decision that has given greatest satisfaction to the advocates of the city beautiful is that in Euclid v. Ambler Realty Co.[31] The zoning system is approved as a valid exercise of the police power. Mr. Justice Sutherland says: "Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." Not only is there segregation of residential, business, and industrial buildings in this ordinance, there is also drastic restriction upon apartment houses. The act represents the collaboration of experts, supported by comprehensive reports, and the decision of the court of last resort is a victory for progress, culture, and esthetics.

4. *Economic Interests and the Police Power*

While the organized community must provide for order, safety, and morals, wealth is almost as necessary to our civilization as these primary social interests. Men cannot be made moral by legislation, but public morality may be promoted by legislation. Wealth ought not to be bestowed by legislation, for it should be the reward of active effort.

Yet the economic interests of all the people, of every class, ought to be promoted by legislation. Our economic system is essentially individualistic and will remain such. But there must be a change of emphasis such as has come over the laws of England, which was the fountain of both individualism and liberty. We must harmonize liberty with economic justice. Property rights must still be sacred, but human rights must be more sacred.

As illustrations of the wide range of economic control a number of recent cases may be briefly noted which do not readily fall under the main heads of the discussion. A Virginia statute provides for the destruction of red cedar trees, infected with cedar rust, within a radius of two miles of an apple orchard. Cedar rust is communicated by spores to apple trees. The United States Supreme Court finds that it is not a denial of due process to protect the state's preponderant interest in its apple crop by sacrificing the lesser interest in cedar trees. The statute does not allow compensation for the value of the standing cedars.[32] The highest courts of New York and Massachusetts had held the operation of theatres to be a business affected with a public interest, and decided that laws restricting the resale of tickets were valid.[33] But the United States Supreme Court by a five-to-four decision holds these laws to be unconstitutional, and declares that the public's interest in a theatre is like that in a grocery or apartment house.[34] An anti-trust act of Colorado which excepts marketing associations is declared invalid for want of certainty.[35] A Georgia law makes it a misdemeanor to entice a farm laborer who is under contract, to leave his employer by offering higher wages. This law is sustained by the state court as not denying due process. This law does not restrict the freedom of the employee, but punishes those who seek to persuade him to break his contract.[36]

5. *Protection against Fraud*

While economic interests had not the assured place in the police power of the primary social interests, yet certain phases of economic police power have long been recognized. Such was the protection against fraud.

There were many laws of this character during the colonial period, such as inspection laws. These efforts to secure a uniform quality were generally given up,[37] but in subsequent years there was other legislation to prevent fraud. Among examples of this power, sustained by the courts, are net weight laws, requiring that lard, for instance, shall be put up in containers holding a specified number of pounds or even multiples thereof, and labeled as specified.[38] Another is a Florida prohibitory tax law on the trading stamp business. The United States Supreme Court decides it is for the legislature to discover and correct evils not only of a definite injury but also such as are obstacles to greater public welfare, as is the use of trading stamps.[39] The New York Court of Appeals finally declared the bulk sales law constitutional, reversing its former decision, frankly conceding that its former decision "stood in opposition to the uniform convictions of the entire judiciary of the land."[40] One of the best illustrations of this exercise of the police power is the enactment of Blue Sky Laws[41] for the protection of investors.

Of recent decisions on laws enacted to prevent fraud we must note the six-to-three decision of the United States Supreme Court invalidating a Pennsylvania law which forbade the use of shoddy in the manufacture of bedding. The usual minority under the leadership of Mr. Justice Holmes would sustain state police laws which are deemed reasonable by reasonable people.[42] A New York law requiring that real estate brokers must obtain licenses, and without such permits may not charge commissions, was sustained by the state court,[43] but an Illinois law prescribing a similar license for land surveyors was held by the state supreme court to serve no legitimate police power purpose.[44] A New York decision sustained the suspension from practice of a lawyer who had violated the canon of ethics of the legal profession forbidding lawyers to advertise.[45] A Michigan law which prohibited the soliciting of personal injury claims, that is, ambulance chasing, was sustained as not violating equal protection.[46]

6. *Protection Against Oppression*

Police legislation against fraud is legislation against distinctly illegal acts, but police legislation against oppression is challenged as violating the liberty of contract. But when superior economic power is used to dictate oppressive terms there is an insistent, rising opinion that oppression is itself a wrong against the citizen and the commonwealth. Legislation against oppression is found in all legal systems, ancient and modern. For example, in Palestine there was a law against the exaction of interest on money loaned.[47] During the greater part of Roman history there was similar legislation, though the Christian emperor Justinian fixed certain rates as permissible.[48] The canon law [49] did not permit interest, and Mohammedan law does not permit it. These laws did not prevent oppression, for men will borrow, and if the law does not protect the contract to pay a fair interest, the borrower must pay an excessive interest on account of the greater risk. Now there are laws generally in our states and abroad against usury in the sense of oppressive rates of interest.

There are also laws against methods of collecting debts which humiliate the debtor and create a public scandal. Accordingly a Massachusetts statute makes it unlawful for debt collectors to wear striking costumes, and a Maine law forbids the publication of lists of debts for sale, or lists of debtors, for the evident purpose of all such practices is to coerce the debtor into payment. Yet the creditor must have some method of moral coercion, as the publication of lists among the trade for the purpose of warning others and cutting off credit.[50]

Insolvency and bankruptcy laws are of the same general character. They are passed by both the state legislatures and by Congress, but the limitations are far greater upon the states than upon the national government. For example, the states are limited by the contract clause, but

Congress is not so limited, and Congress has an explicit grant of this power.[51]

Much legislation exists in all our states for the protection of labor. Some of this is not really police legislation at all, such as regulations of convict labor or of free labor employed by the states or their subdivisions. A taxpayer recently brought action to enjoin a New York city contract for subway construction on the ground that it was wasteful and illegal. The contract complied with a law which stipulated an eight-hour day and wages at prevailing rates. The eminent Judge Cardozo held the law valid.[52] This is an exercise of the proprietary power of the state legislature, but laws for the protection of labor which restrain individual liberty and property rights fall under the police power. If such legislation is enacted in the interest of health it has a fairer chance of being sustained by the courts than if it is clearly to advance economic interests and social reform.

Thus legislation regulating the hours of labor of women and children is sustained as health legislation in behalf of wards of the state.[53] Men are *sui juris,* and yet if the character of their work and the isolation of their life put them in a condition of economic inferiority, as related to their employers, or if their occupation is dangerous, protective legislation in their behalf will be sustained.[54] Under the one or the other description the list of protected industries has been greatly extended in many states.[55]

But may the legislature under its police power regulate the rate of wages? Freund in 1904 said: "The power to regulate the rate of wages, while freely exercised in former times, has not been claimed by any American state." [56] He said that considerations of health and safety did not enter into the question of rates. "The regulation would be purely of an economic character." Laws had been sustained requiring weekly payment of wages and forbidding store orders. Twelve years after Professor Freund thus wrote of wage-fixing, Professor Commons wrote as follows: "Work may be done under safe and sanitary conditions, for hours not too many, and payment of wages may be prompt and regular, but if the amount received is too small to secure the necessaries of life, the worker's health and welfare are menaced. Therefore, the same motives which have carried most of our states to establish minimum standards to guard the workers against unsafe and unsanitary conditions, have carried many of them to set up standards for protection against the evils of low wages."[57] There has been a significant development of minimum wage legislation in New Zealand, beginning as long ago as in the eighties, in Australia, and finally in Great Britain, based on Australian law. There has been a corresponding development on the continent of Europe.[58] The first American state to pass a minimum wage law was Massachusetts, in 1912.[59] In 1913 eight states followed the example of Massachusetts, and in subsequent years other states took similar action. The Massachusetts law was based on publicity, indirectly compelling employers by public sentiment to pay women the wages established by the board, but in the states generally the plan was directly compulsory upon employers of women.[60] The Oregon minimum wage law having been sustained by the state supreme court, the case was appealed to the United States Supreme Court. Mr. Justice Brandeis had assisted in defending the case before becoming a member of the court. He took no part in the decision. The remaining eight justices divided evenly for and against the law. The law was sustained and there was no opinion.[61] After this doubtful determination the supreme court of Arkansas upheld the minimum wage law of that state.[62] A like decision was reached in Minnesota. But in the case of Adkins v. Children's Hospital the United States Supreme Court by a vote of five to three, Mr. Justice Brandeis not sitting, the act of Congress of 1918, establishing standards of minimum wages for women and children, was declared unconstitutional. This fateful decision was handed down in 1923.[63] It was hoped that by a change of one member the Adkins case would be overruled, but this possibility was shattered when in 1925 the court held the Arizona minimum wage law void. Mr. Justice Brandeis alone dissented, and Mr. Justice Holmes defended his concurrence solely on the ground that he regarded himself bound by the previous decision.[64] The similar laws of other states have been declared invalid,[65] and even the Massachusetts law becomes ineffective when the leading paper of the state refuses to publish the findings of the board.[66] In fact war-time and post-war-time conditions have made minimum wage laws an unnecessary administrative burden, but when pre-war conditions return the judicial amendment of the constitution may be regretted.

7. *Social Reform and the Police Power*

Thus we have seen that there has been a steady expansion of the police power of the states. Laws which were thought revolutionary and unconstitutional, and were annulled by the courts, were later revived and found constitutional.[67] This movement has been retarded by the courts, but ultimately they yield to public opinion, if the opinion is settled, and not fleeting, and is entertained by the intelligence and conscience of a clear majority of the people. There has been and is a social revolution throughout the world, which will be safe and sane if not unreasonably retarded, but destructive and insane if unduly held back. Says Dr. McLaughlin of the University of Chicago: "If the individualistic interpretation of our constitution and laws is to abide, it is because, by the exercise of the police power, a new principle of collectivism has become dominant and controlling in cases of a clear and absolute need. This principle of correction is antithetical to the doctrine of socialism in spite of its similarities; it proceeds on the notion of personal ownership and personal rights of determination; but it controls individualism by considerations of public well-being and convenience, and, rightly applied, puts the interests of the state above the interests of any of its members." [68]

[1] Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U. S. 207.

[2] Mississippi ex rel. Robertson v. Miller, 276 U. S. 174.

[3] Whitney v. California, 274 U. S. 357.

[4] Fiske v. Kansas, 274 U. S. 380.

[5] Railway Company v. Railroad Commission, 205 N. W. 932 (1925).

[6] Napier v. Atlantic Coast Line R. Co., 272 U. S. 605.

[7] Cushman, R. E., in *American Political Science Review*, Vol. 22, pp. 103 ff.

[8] Powell v. Pa., 127 U. S. 678.

[9] John F. Jelke Co. v. Emery, 214 N. W. 369 (1927).

[10] Cushman, R. E., in *American Political Science Review*, Vol. 22, p. 630.

[11] Utah State Fair Association v. Green, 249 Pac. 1016 (1926).

[12] Hall, J. P., *Constitutional Law*, p. 145.

[13] *American Year Book* for 1914, p. 391.

[14] See related case of Lester v. Lester, 97 Atl. 170.

[15] Kales, A. M., *Domestic Relations and Persons*, p. 326.

[16] Freund, E., *Police Power*, p. 252, Sec. 265.

[17] *Ibid.*, pp. 247, 248.

[18] *Ibid.*, p. 248.

[19] *Ibid.*, pp. 252, 253.

[20] *Ibid.*, pp. 253, 254: "The requirement of a license to conduct a private school, and its visitation by public authorities, would certainly be legitimate." But he doubts that the state can suppress all private schools on ground of religious liberty.

[21] 268 U. S. 510.

[22] Freund, E., *op. cit.*, p. 158.

[23] *Ibid.*, p. 159.

[24] *Ibid.*, p. 158.

[25] Seattle v. Ford, 257 Pac. 243 (1927).

[26] Freund E., *op. cit.*, pp. 416, 417.

[27] *Ibid.*, pp. 162–166.

[28] Attorney-General v. Williams, 174 Mass. 476. Williams v. Parker, 188 U. S. 491 (1903).

[29] Freund, E., *op. cit.*, pp. 165 ff.

[30] Cain v. State, 287 S. W. 262 (1926). Thomas Cusick Co. v. Chicago, 242 U. S. 526 (1917).

[31] 272 U. S. 365.

[32] Miller v. Schoene, 276 U. S. 272.

[33] People v. Weller, 237 N. Y. 316.

[34] Tyson and Bro. v. Banton, 273 U. S. 418 (1927).

[35] Cline v. Frink Dairy Co., 274 U. S. 445.

[36] Rhoden v. Steele, 129 S. E. 640 (1925).

[37] Freund, E., *op. cit.*, pp. 263 ff.

[38] North Dakota.

[39] Humes v. Ft. Smith, 93 Fed. 857 (1899). Lansburgh v. D. of Columbia, 11 App. D. C. 512. Sperry and Hutchinson Co. v. State, 188 Ind. 173 (1919), invalid.

[40] Wright v. Hart, 182 N. Y. 330.

[41] Hall v. Geiger-Jones Co., 242 U. S. 539. Standard H. Co. v. Davis, 217 Fed. 904.

[42] Weaver v. Palmer Bros., 270 U. S. 402 (1926).

[43] Roman v. Lobe, 152 N. E. 461 (1926).

[44] Doe v. Jones, 158 N. E. 703 (1927).

[45] In re Cohen, 159 N. E. 495 (1928).

[46] Kelly v. Boyne, 214 N. W. 316 (1927).

[47] *Exodus* 22:25; *Leviticus* 25:35–37; *Psalms* 15:5.

[48] Muirhead, J., *Law of Rome*, pp. 86 ff. Sandars, T. C. (Ed.), *The Institutes of Justinian*, p. 325.

[49] Freund, E., *op. cit.*, pp. 288 ff.

[50] *Ibid.*, pp. 286 ff.

[51] *Ibid.*, pp. 291 ff. Commons and Andrews, *Principles of Labor Legislation*, pp. 225 ff.

[52] Campbell v. City of New York, 155 N. E. 628 (1927). The court refused to follow Connally v. General Construction Co., 269 U. S. 385, which decision was inconsistent with Atkin v. Kansas, 191 U. S. 207.

[53] Freund, E., *op. cit.*, pp. 296–300. Commons and Andrews, *op. cit.*, pp. 208 ff.

[54] Holden v. Hardy, 169 U. S. 366.

[55] Freund, E., *op. cit.*, pp. 300 ff. Commons and Andrews, *op. cit.*, pp. 225 ff.

[56] Freund, E., *op. cit.*, p. 303.

[57] Commons and Andrews, *op. cit.*, p. 168.

[58] *Ibid.*, pp. 171–176.

[59] *Ibid.*, p. 177. Holcombe v. Creamer, 120 N. E. 354; sustaining the Mass. law.

[60] Young, J. T., *New American Government and Its Work*, Revised Ed. of 1923, p. 415.

[61] Stettler v. O'Hara, 243 U. S. 629 (1917).

[62] State v. Crowe, 197 S. W. 4 (1917).

[63] Adkins v. Children's Hospital, 261 U. S. 525.

[64] Murphy v. Sardell, 269 U. S. 530 (1925). *American Year Book* for 1925, p. 140.

[65] Topeka Laundry Co. v. Court of Industrial Relations, 237 Pac. 1041 (1925).

[66] Commonwealth v. Boston Transcript Co., 144 N. E. 400.

[67] German Alliance Ins. Co. v. Lewis, 233 U. S. 389.

[68] McLaughlin, A. C., *The Courts, the Constitution, and Parties*, p. 279.

CHAPTER XXVIII

FEDERAL POLICE POWER: GENERAL WELFARE

1. *Review of State Police Power*

In the controversy between the fundamental rights of citizens, as binding on the state legislatures, and the necessary rights of society, as committed to the state legislatures under their general regulatory powers, the decision first falls to the legislatures, when statutes are enacted, and later to the courts, as to whether such statutes conflict or not with the supreme law of the land. The rights of the citizens are not absolute; they must yield to the rights of society. The rights of society are not absolute; their exercise must be reasonable, so as not to nullify the rights of citizens. Yet the rights of society are paramount. The exercise of this internal public policy we call the police power. Mr. Justice Holmes, speaking for the majority of the United States Supreme Court, gave the police power a liberal interpretation, as follows: "The police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[1] When cases come up to the United States Supreme Court involving the state police power two very divergent attitudes of the judges to their functions are revealed by recent cases. There is the liberal attitude of Justices Holmes and Brandeis — liberal to the states, and the opposite attitude of Justices Butler and Sutherland — liberal to the contesting citizens. The doctrine of Mr. Justice Holmes he states in the following words: "If the Fourteenth Amendment were now before us for the first time I should think that it ought to be construed more narrowly than it has been construed in the past. But, even now, it seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that are fairly open to debate." [2] The opposite attitude of Justices Butler and Sutherland has been described as follows: "These justices seem to address themselves, with evident relish, not to the question whether the validity of the law is reasonably debatable, but to the question whether they themselves are convinced that it is a reasonable enactment." [3] The remaining five members of the court reveal a mediating attitude, somewhat vacillating. A case illustrating the two attitudes is Burns Baking Co. v. Bryan,[4] coming up from Nebraska. During the war the federal government had regulated the size of loaves of bread, under the direction of Mr. Hoover, with such success that somewhat less stringent regulations were afterward proposed by the departments of Commerce and Agriculture to Congress, and were adopted by a number of states, Nebraska among them. The mass of evidence as to the effectiveness and fairness of the law was overwhelming. Yet Mr. Butler, speaking for the majority, took no judicial notice of this evidence in governmental reports, much of it gathered after the trial in the lower court, but relied on his independent judgment of the evidence in the record, without deference to the judgment of the legislature. Mr. Brandeis in his dissenting opinion concluded as follows: "To decide, as a fact, that the prohibition of excess weights is not necessary for the protection of the purchasers against imposition and fraud by short weights, . . . is, in my opinion, an exercise of the power of a superlegislature — not the performance of the constitutional function of judicial review."

2. *Relation of the State Police Power to the Enumerated Powers of Congress*

We have seen that state police power in America has been emphasized and enlarged for the very purpose of protecting the public from improvident special privileges granted to corporations and claimed to be contracts permanently protected by the federal constitution. We have seen that the police power of the states is very wide in its range of subjects; not only does it include the primary social interests of order, health, safety, and morals, but it includes economic interests and social reform — everything which is comprehended in internal public policy. But the police power comprehends not only a wide range of interests, it may be exercised upon every person and all the property within the state. "This police power of the state," says an eminent judge, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state."[5] Thus a ship, tying up at our docks, though it has come from Cuba in foreign commerce, is, to a certain degree, subject to the police power of the state. Goods passing through the city of Philadelphia by auto-truck from New York to Reading, come within the police power of the city of Philadelphia. The same is true of mail automobiles, speeding through the streets, and of the district attorney, hurrying to the federal building. The police power of the state is not excluded from these subjects, though they are committed to the federal government, and the United States constitution, statutes, and treaties are the supreme law of the land. There is no serious conflict because the purpose of the state police power is the regulation of the rights of all with a view to the protection of all. Even so there might be serious conflict between state administrative officers and federal administrative officers, were it not such controversies are referred to the courts with appeal to the higher federal courts. In the first section of this chapter we considered conflicts between state police power and rights of citizens protected by federal law. Now we are considering conflicts between state police power and the enumerated powers of Congress. It is the theory of some that the powers of state legislatures are to be strictly construed in favor of individual rights, and that the powers of Congress are to be strictly construed in favor of state rights.[6] The writer believes that government is not a necessary evil, but means by which every citizen may attain a more worth-while and satisfying life. Therefore the powers of the state are paramount over the rights of the individual, and the powers of Congress are paramount over the rights of the member states.

This conflict over the incidental control by the states of matters committed to the national government is a difficult problem as may be shown by recent cases. "While the state may make reasonable police regulations for the use of highways, and may even affect interstate commerce incidentally thereby, and while it may also impose a reasonable license fee for the use of state highways, it may not deny the right to engage in interstate commerce to any one nor directly obstruct such commerce." [7] Therefore it may not require a certificate of convenience or deny the use of its roads on the ground that the territory is sufficiently served already. "A state may impose upon those who use its highways, even when they are engaged exclusively in interstate commerce, a tax to help cover the cost and upkeep of the roads." [8] But the tax must not discriminate against interstate commerce or amount to a burden upon it. A license fee imposed by a local ordinance on a bus line, doing both local and interstate business, which fee has no reasonable relation to municipal police control or to the upkeep of the highways, is a burden on interstate commerce and is invalid.[9] If one is engaged in interstate trucking under contract, the state may not declare him a common carrier and force him to use his facilities as such and file an indemnity bond.[10] Yet a state may regulate the weight of loads upon its highways.[11] So much for highways; similar but not identical principles govern interstate ferries. Ferries at boundary lines may be regulated by state law as to rates, and with respect to safety and convenience, but no state may forbid their operation without a license.[12] On the other hand, in the interstate transmission of electric current the public service commission of the producing state may not raise the contract price on the ground that such rate does not give a fair return. This is held to be a burden on interstate commerce.[13]

The state of Pennsylvania in the exercise of its police power in the interest of order maintains local and state police forces and in case of extreme emergency may resort to martial law. The nation maintains an army and navy in time of peace and in war-time its war power vastly extends its authority to interfere with the exercise of state powers. During the Great War there were large federal forces in and about the city of Philadelphia, and the maintenance of order in the city was a question of vital interest in upholding discipline in the forces. Therefore Colonel Hatch, representing the federal government, interfered in police affairs of the city and demanded the appointment of Captain Mills as head of the force. There was compliance by the municipal authorities and no resort to the courts was made, yet the newspapers discussed the possible effect of the declaration of martial law.

3. *Is There a Federal Police Power?*

It is the theory of the courts that the states did not surrender their police power when they surrendered the enumerated powers to the federal government.[14] Can there be then a federal police power? We examine the state constitution for limitations on the state government; we examine the federal constitution for expressed or implied grants to the federal government. There is no expressed grant of the police power in the federal constitution. The preamble says: " We the people of the United States in order to . . . promote the general welfare . . . do ordain . . . this constitution. . . ." But a preamble does not give power, it announces the general purposes of the new government. One of the purposes was to promote the general welfare. The first power of Congress is expressed as follows: " The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." This is not a power to pass laws for the general welfare, but to impose taxes for the general welfare. It was supposed to be an established doctrine that under this power money could be expended for the general welfare or that the tax law itself could be so framed as to promote the general welfare.[15] Decisions which have weakened this supposedly established doctrine have been measurably corrected by still more recent decisions, as will be explained later. The present point is that there is an expressed general welfare clause attached to the taxing power. From this clause alone we cannot deduce a federal police power or a general welfare power in Congress.[16] There is an implied general welfare clause, however, in every one of the enumerated powers granted to Congress. Each power is a plenary power, and paramount over state action. So Congress may regulate foreign commerce for the general welfare, may establish post offices for the general welfare, and may declare war for the general welfare. Congress may regulate interstate commerce, not only to take away barriers erected by the states, but may enact laws in its regulation of such commerce that will contribute to the well-being of the country.[17] Congress has, therefore, a police power, though the term is not much used, in connection with every granted power.[18] When the states granted to the federal government its enumerated powers they reserved by implication their police power, that is, their general regulatory power over all persons and all property within their bounds for the common benefit, even though such regulations might sometimes incidentally encroach upon the powers granted to Congress. But if Congress passes laws within the enumerated grants which conflict with state regulations, the latter must give way, for within its field the will of Congress is paramount.

4. *Limitations on the Federal Police Power*

Of the limitations on the federal police power the principal one is this that every exercise of police power must come clearly within an expressly granted power or within a necessarily implied power in one or more of these expressly granted powers. There is no general police power granted by the federal constitution to Congress. Are these limitations directory or mandatory?[19] Article I, Section 2, provides that, "Representatives . . . shall be apportioned among the several states . . . according to their respective numbers. . . . The actual enumeration shall be made . . . within every . . . term of ten years, in such manner as they shall by law direct." To provide for reapportionment in every ten-year period is the plain duty of Congress, but no court may compel Congress to act. It is directory. It is the theory of the writer that the several limitations on Congress are directory, not mandatory. They are binding on the consciences, supported by the oaths of the members, and are further enforced by public opinion and by the people at the polls. But it is the theory of the courts that the limitations are, for the most part, mandatory and are to be enforced accordingly by the courts. While the courts may not compel action, they can veto action. Such is the theory. Thus when the first child labor law had been passed, an injunction was applied for in the western district of North Carolina, and in 1917 Judge Boyd granted it, declaring the law unconstitutional. Appeal was taken at once to the United States Supreme Court which sustained the decision of the lower court.[20] Thus a law which was warmly supported by welfare organizations in a long period of popular education and was finally enacted by Congress, and was attune with enlightened policy in the leading nations of the world, was struck down by a single judge, exercising the assumed judicial veto. Yet Congress cannot bitterly complain that a coordinate power has made itself supreme, when it does not itself obey the command of the constitution to reapportion the House of Representatives. When Congress sues in the supreme court of public opinion it must come with clean hands. It is the opinion of the writer that the courts will not retire from their untenable position till the methods of legislation have been so corrected as to command the confidence of the people.

5. *Exercise of the Federal Police Power for the Primary Social Interests*

This limited federal police power has been exercised in the protection of the primary social interests. Among recent acts in the interest of order may be mentioned the Espionage Act of 1917, the Sedition Act of 1918, and the Sabotage Act of 1918. The act of 1918 to exclude alien anarchists also belongs here. The act of 1918 to punish the interstate transportation of stolen automobiles was sustained in the case of Brooks v. United States.[21] Chief Justice Taft says: " Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." He distinguishes this case from Hammer v. Dagenhart,[22] for in that the first Child Labor Law was declared invalid as an attempt to regulate labor in the state of origin. But the stolen automobile in itself is no more harmful than the child-made goods, and in either case there is an evil affecting society in general.

Among acts in the promotion of health, besides the well-known earlier acts, there are the act of 1914 to regulate the hours and safeguard the health of women workers in the District of Columbia, and the act of 1918 to combat the Spanish Influenza and other diseases. There was the act to lessen the menace of the alley dwellings in Washington. The Harrison Narcotic Act of 1914 was designed not to produce revenue but to curtail and even suppress the traffic in habit-forming drugs. Yet it was sustained by a five to four decision in the case of Doremus v. United States,[23] convicting a " physician who had supplied a drug addict with large quantities of narcotics in violation of the rules established." [24] This decision was weakened by others following,[25] and it was suggested that it might be overthrown. But in the case of

Nigro v. United States [26] the court has again sustained the validity of the law. The court shows that an amendment to the act has made it satisfy the revenue producing test, and finds that the detailed directions are reasonably necessary "to make it difficult to sell narcotics without paying the tax." [27]

6. *Exercise of the Federal Police Power for Economic Interests and Social Reform*

There have been many acts of Congress attempting to promote economic interests and social reform. Only a few need be named or discussed. Among them are the Seamen's Act of 1915, the Adamson Eight-Hour Act of 1916, the Child Labor Acts of 1916 and 1919, the Minimum Wage Act of 1918 for women workers and minors in the District of Columbia, and the price guaranty to wheat producers of 1919. The Futures Trading Act of 1921, as an exercise of the taxing power, was declared invalid, for the tax was made prohibitory and so was in no proper sense a tax, that is, as decided.[28] The law of 1919 to prevent rent profiteering in the District of Columbia was sustained by the court, speaking through Justice Holmes. He said: "The regulation is . . . justified as a temporary measure. . . . Machinery is provided to secure the landlord a reasonable rent." [29] Upon the expiration of two years the law was extended by Congress. Was the extension valid? Justice Holmes again spoke for the majority. He thought that living conditions had considerably improved, but did not attempt to decide the case on insufficient evidence in the record. He turned back the case to the supreme court of the district, with instructions to make a careful survey of existing conditions and to preserve the evidence for review.[30] Is a protective tariff constitutional? The question has been debated since 1787, but the first decision of a court was on April 9, 1928, in the case of Hampton v. United States.[31] Says Chief Justice Taft: "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action." The commentator, Cushman, has this to say: "The court might have added that Congress may properly use one of its delegated powers as a means of exercising another, and that a protective tariff may be looked upon as use of the taxing power to facilitate the regulation of commerce, just as the tax on state bank notes was sustained in Veazie Bank v. Fenno as means of exercising the delegated federal power over the national currency."[32]

7. *The Eighteenth Amendment*

It is sometimes represented that the adoption of the 18th Amendment is an intrusion of religion and morals into the domain of positive law, which violates the natural and constitutional rights of personal liberty.[33] It is represented that there are certain things which no government on earth can do.[34] This experiment in idealism no doubt has its inspiration in religious sentiment. Religion is one of the most conservative powers known to man. By it the accumulated experiences of the race, the hard-fought victories through the centuries, the gains in the evolution of man, are held by each new generation. But religion is more progressive than conservative. It is the divine sonship in man pressing on toward the divine ideal.

They were men of religion who founded the colonies. None but strong men of strong faith could have succeeded. Afterward in response to the demand for labor shiploads of human derelicts were sent, till the colonies passed laws to restrain the pestilence.[35] So there were saints and sinners here in very truth. The religious refugees, militant saints, were Independents in New England, Baptists in Rhode Island, Huguenots in New York, Quakers, Palatine Protestants, and Scotch-Irish Presbyterians in New Jersey and Pennsylvania, Roman Catholics in Maryland, and Cavalier High Churchmen in Virginia. Both saints and sinners were subjected to the heats and frosts of a continental climate. The universal medicine and beverage were intoxicating liquors in their several forms. Men of the highest ideals and brightest minds were entrapped by alcoholism. Base men became baser. The church called upon the people to be temperate, but bitter experience taught the church that temperance means total abstinence from the use of intoxicating liquor as a beverage.[36] There were the Washingtonian movement, the Father Matthews movement, and the Francis Murphy movement. All sorts of experiments were tried, local option, county option, low license, high license, and the dispensary system. Many states before the Civil War adopted prohibitory laws in a wave of enthusiasm, and all, except Maine, went back to the license system. The Anti-Saloon League was organized in 1893.[37] It began a relentless war, seeking to dry up the country by local option and county option, by better laws and better enforcement. Every year recorded advances and retreats, but the net gain was always on the side of progress. Not only did many states become prevailingly dry by county option, state after state, beginning this new movement with Kansas, adopted prohibition. Then in 1914 accelerated activity was evidenced by five states adopting prohibition. There were five again in 1915, four in 1916, four in 1917, and five in 1918. By that year thirty-three states and the territories of Alaska, Porto Rico, and Hawaii had prohibition laws. "It is estimated that at the time national prohibition took effect 68.1 per cent of the population of the United States was living in dry territory. The remaining 31.9 per cent, however, included the largest and most heterogeneous population centers, which offer much more difficult enforcement problems." [38]

Beginning in 1917 there were war-time restrictions on the manufacture of liquor,[39] and War-Time Prohibition Acts went into force in 1919.[40] The 18th Amendment went into effect Jan. 16, 1920,[41] after being ratified by decisive majorities in forty-five states. The Volstead National Prohibition Act provided for the enforcement of the War-Time Prohibition Acts and continued their life until the 18th Amendment should go into effect, and then by separate provisions it put the policy of the amendment into force.[42] The amendment gave concurrent power to Congress and the states, which does not mean joint or divided power, for Congress may act independently of the states, and state action may be additional to the action of Congress, but not in nullification of it.[43] All of the states, but Maryland, have passed enforcement acts, but New York and some others have repealed their acts.[44]

When the amendment was passed politicians who had been the life-long supporters of the liquor interests, were carried off their feet and gave loud support to prohibition. Many slaves of drink thought themselves already free. But habits that are the inheritance of centuries are not overcome by the passage of a law. International interests of countless millions of dollars are not struck down in one bloody fray. A new jubilee has been proclaimed, not only for the United States, but for all the countries of the world north and south of the tropical belt,[45] and the fight will go on until men are actually free, until prohibition is effectually enforced.[46]

[1] Noble State Bank v. Haskell, 219 U. S. 104 (1911).

[2] *American Political Science Review*, Vol. 21, pp. 87 ff. Schlesinger v. Wisconsin, 270 U. S. 230 (1926).

[3] Cushman, R. E., in *American Political Science Review*, Vol. 21, p. 85.

[4] 264 U. S. 504 (1924).

[5] Redfield, Chief Justice, in Thorpe v. Rutland and B. R. Co., 27 Vt. 140. Cooley, T. M., *Constitutional Limitations*, p. 708.

[6] Willoughby, W. W., *On Constitutional Law*, Vol. I, pp. 55–58. Cooley, T. M., *op. cit.*, p. 74.

[7] Cushman, R. E., in *American Political Science Review*, Vol. 20, p. 105, on case of Buck v. Kuykendall, 267 U. S. 307.

[8] *Ibid.*, Vol. 22, p. 105 on case of Clark v. Poor, 274 U. S. 554.

[9] Sprout v. South Bend, 277 U. S. 163.

[10] Michigan P. U. Commission v. Duke, 266 U. S. 570.

[11] Morris v. Duby, 274 U. S. 135.

[12] Vidalia v. McNeely, 274 U. S. 676.

[13] Public U. Commission v. Attleboro S. and E. Co., 273 U. S. 83.

[14] Cooley, T. M., *op. cit.*, pp. 708 ff.

[15] Willoughby, W. W., *op. cit.*, Vol. I, pp. 578 ff. Head Money Cases (Edye v. Robertson), 112 U. S. 580. Veazie Bank v. Fenno, 8 Wall. 533.

[16] Willoughby, W. W., *op. cit.*, Vol. I, pp. 39 ff.

[17] Freund, E., *Police Power*, p. 64, Sec. 66.

[18] *Ibid.*, p. 62, Sec. 65.

[19] Cooley, T. M., *op. cit.*, pp. 88–98 (*Contra*). Cooper v. Telfair, 4 Dallas 14; Mr. Justice Chase: "The general principles contained in the constitution are not to be regarded as rules to fetter and control, but as matters merely declaratory and directory." Congress has passed the Reapportionment Act of June 18, 1929.

[20] Hammer v. Dagenhart, 247 U. S. 251.

[21] 267 U. S. 432 (1925).

[22] 247 U. S. 251.

[23] 249 U. S. 86.

[24] Cushman, R. E., in *American Political Science Review*, Vol. 20, p. 84.

[25] Linder v. U. S., 268 U. S. 5. United States v. Daugherty, 269 U. S. 360 (1926).

[26] 276 U. S. 332 (1928).

[27] Cushman, R. E., in *American Political Science Review*, Vol. 23, p. 80.

[28] Hill v. Wallace, 259 U. S. 44. Trusler v. Crooks, 269 U. S. 475 (1926): "That Sec. 3 was not intended to produce revenue but to prohibit all such contracts."

[29] Block v. Hirsh, 256 U. S. 135; a five to four decision.

[30] Chastleton Cor. v. Sinclair, 264 U. S. 543 (1924).

[31] 276 U. S. 394 (1928).

[32] Cushman, R. E., in *American Political Science Review*, Vol. 23, p. 79.

[33] Blakemore, A. W., *National Prohibition* (1925), pp. 5 ff. National Prohibition Cases, 253 U. S. 350.

[34] Norton, T. J., *Losing Liberty Judicially*, pp. 124 ff.

[35] Bolles, A. S., *Pennsylvania*, Vol. II, p. 137.

[36] Ashhurst, Prof. John, Jr., of University of Pennsylvania, on "Temperance" in Johnson's *Cyclopedia*, Vol. VIII, p. 56.

[37] Anti-Saloon Year Book for 1915, p. 5.

[38] Johnson, F. E., in *American Year Book* for 1925, p. 249.

[39] Koren, J., in *American Year Book* for 1917, p. 390.

[40] Koren, J., in *American Year Book* for 1918, p. 442.

[41] On this date 36 states had ratified the amendment. Koren, J., *op. cit.*, p. 442. All states but N. J., Conn., and R. I., gave their assent. Koren, J., in *American Year Book* for 1919, p. 437.

[42] The Volstead National Prohibition Act was passed over the president's veto Oct. 28, 1919.

[43] Blakemore, A. W., *op. cit.*, pp. 8–17: "The effect of the 18th Amendment was to give to Congress the same police power to stamp out the manufacture, sale, and transportation of liquor that the states had before the Amendment."

[44] Johnson, F. E., in *American Year Book* for 1925, p. 249.

[45] *Scientific Temperance Journal*, Vol. 32, pp. 110 ff.

[46] *American Year Book* for 1927, pp. 19 ff.

CHAPTER XXIX

EMINENT DOMAIN: PUBLIC USE AND COMPENSATION

1. *Review of the Eighteenth Amendment*

The constitutions of some countries are said to be unwritten, though they contain as essential elements bodies of statute law, as well as unwritten customary law and conventions, which last are enforced by public sentiment and not by court action. These constitutions are most easily changed and are always in process of change, yet if the people are stable and practical, with determination to meet their obligations and to give justice to all persons within the jurisdiction of their government and to all states in the family of nations, their constitutions are as remarkable for their permanence as for their flexibility. This permanence in their institutions is due largely to the rigor of law enforcement and to the habit of obedience to law. Freemen are not lawbreakers.[1]

But unwritten constitutions are almost extinct. Nearly every country has a written constitution, and all are based, closely or remotely, on American models. It is almost impossible to over-emphasize the educational value of a written constitution. It proclaims to the people whom it governs and also to the whole world its political creed, the fundamental principles of the government. The document, when first published, may have many critics at home and abroad. Its great ideals may be somewhat neutralized by concessions to entrenched wrong, but in time the document, not quite approved by any at first, comes to be looked upon as a sacred inheritance.[2]

From time to time amendments inscribe the successive advances toward the attainment of developing ideals. Each successive reform, when proposed, is viewed with alarm, and the greater the established abuse, the more clamorous are its defenders. But advancing morality and understanding win the adherence of religious and humanitarian organizations. Political areas are won, town after town, county after county, state after state. Finally the majority necessary to adopt and ratify an amendment to the national constitution is obtained in a flare of enthusiasm. But the inevitable reaction comes. It has always been so in every great reform. Men of the best of will in their disappointment pass into a disillusionment, as they call it, and turn from reformers into pensioners of vested interests. The creedal statement remains in the fundamental law, proclaiming an ideal at home and abroad. Education and attempted enforcement continue with increasing success, and what was hated as an encroachment on liberty comes to be seen as a necessary condition of real liberty. This has been the history of every reform, and no gift of prophecy is needed to plot the future of the 18th Amendment.[3]

It was claimed that the amendment was not an amendment in the sense of the 5th Article, because not germane to the constitution, for it was ordinary legislation, not a change in the forms and procedure of government.[4] It was, furthermore, inconsistent with a federal constitution, for it gave to Congress a power which in a federal system belongs to the states. Again, it was claimed not to have been ratified by a sufficient number of states at the time it was proclaimed as a part of the constitution, because the legislative acts of many legislatures were subject by their state constitutions to reference to the electorate.[5] These arguments, though ably presented at great length by eminent lawyers, were not honored by an extended opinion, for the points had been covered in many earlier cases. The court briefly answered the questions raised by the Amendment in eleven paragraphs without discussion and with citation of only three authorities.[6] It may be said that though a constitution should theoretically have little beyond a form of government and bill of rights, yet all constitutions do have substantive provisions, and the United States Constitution had such matter from the first. If the 18th Amendment is ordinary legislation, so is the 13th. If the 18th Amendment tends to centralize legislative authority in Congress, so did the 14th. If it was ratified by state legislatures and not by popular referendum, so were the 16th and 17th Amendments, and objections were overruled. The founders established a national government. All constituent states ratified the 5th Article on the amending process. All the amendments, including the 18th, were ratified by the state legislatures according to procedure laid down in that article. The 18th Amendment is as truly a part of the Constitution as any other article or amendment. Indeed it is of higher authority than any older part of the Constitution, because it supersedes all earlier provisions so far as they conflict with the 18th Amendment.[7] It confers on Congress a wide police power to carry out its purposes.

The Volstead Act was passed under the authorization of the Amendment and the additional police power conferred on Congress. Its validity was challenged on the ground that Congress passed it before the Amendment went into effect, but after its ratification it was in effect so far as to authorize Congress to pass laws which would go into effect when the prohibitions of the Amendment became operative.[8] Suppose a man has been acquitted of violation of a criminal section of the Volstead Act, may his premises be padlocked under other provisions of the act? Yes, the criminal section looks to the past, but the equity section looks to the future if there is adequate justification of resort to such drastic action.[9] An automobile, used in illegal transportation of liquor, may not be forfeited for the illegal transportation if the owner can prove his innocence, but such an automobile may be forfeited for violation of the revenue law,[10] even though the owner may be innocent. Thus teeth are put into the Volstead law by the application of an unrepealed revenue law. Newly enacted legislation adds other teeth to the Volstead Act.

2. *Just Compensation*

The last remaining fundamental right of the citizen which we will consider in this study is found in the 5th Amendment: "Nor shall private property be taken for public use, without just compensation." The protection from any state passing a "law impairing the obligation of contracts" was made an introduction to the consideration of the police power. So this last fundamental right will introduce the doctrine of eminent domain and be considered at length under that head. The right of protection from laws impairing the obligation of contracts is a federal guaranty against state action, though some would include it in due process and thereby limit Congress.[11] The right of just compensation is a limitation on Congress, but the courts by including it in due process make this right a limitation on the states through the 14th Amendment.[12] There is a great variety of expression of this right in state constitutions and of provisions upon eminent domain. Thus as the federal constitution is interpreted there is protection against state action, and this is true of state constitutions, very generally at least. There is protection in the 5th Amendment from congressional action.

3. *Vattel's Definition of Eminent Domain*

"It is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand."[13] Vattel was born early in the 18th century in French Switzerland and wrote learnedly in French on public law. He was much employed in the service of German states. His definition of eminent domain is so comprehensive that it practically includes police power. When Professor Freund[14] defines police power as internal public policy, his definition is so comprehensive that it includes eminent domain. Cooley ends his lengthy definition of eminent domain with this paraphrase of the words of Vattel. He also gives a very good working definition of his own, as follows: "That superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken or its use controlled for the public benefit without regard to the wishes of its owners."[15]

4. *The Broad Doctrine of Kent Compared with the Narrow Doctrine of Cooley*

In Great Britain Parliament decides, without appeal to any superior body or court, when property shall be taken, what property, and for what purpose. But in this country the courts assume to revise the legislative determination as to whether the purpose is public or not, and whether parties have their full constitutional protection or not. The great legal light of New York, Chancellor Kent, took a broad, liberal view, treating the legislature with deference. He said: "If the public interest can in any way be promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit will be of sufficient importance to render it expedient for them to exercise the right of eminent domain."[16] While the learning of Kent, who was trained in the Roman law, commanded great respect in the early day, yet the narrow doctrine afterward associated with the name of Cooley was frequently applied in cases before his time, and later no American legal writer was more influential than he. Cooley said: "The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies, and a due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."[17]

5. *Conclusion upon Public Use*

The British Parliament in effect took the estates of the Irish landlords, giving just compensation, and sold the lands to the tenants on such favorable terms that the tenants paid less in their annual installments than they had formerly paid in rent. Under parliamentary authorization slum districts in Whitechapel, London, were purchased, and replotted; model houses were built, and the property was sold to the people on favorable terms. Both of these purposes would not be regarded as public by our courts. The state or local government body must continue to own the land and employ it for its proper functions, else the purpose is not public. A railroad may take private property by eminent domain, for the functions of a railroad are public though the ownership is private.

Formerly it was denied that the establishment of a city park and playground was a public purpose to the extent that the property could be taken from unwilling owners.[18] Now this is conceded. Suppose a city took land by eminent domain for a city street and paid full value, but later the city was induced to vacate the street so that a leading university which owned two blocks could unite them in an athletic field. Would the land go to the abutting owner, in this case the university? No, to the owners whose property was taken. This principle would apply to property taken for a public purpose but no longer required and therefore sold. Such a sale might be invalidated by the heirs of the original owners. Thus there has been an excessive protection of private rights and inadequate protection of public rights.

The writer therefore contends that the correct view of public purpose is that of Kent and not that of Cooley. Public use should mean use to the public, not necessarily use by the public. It is recognized by the mill laws of New England,[19] the irrigation laws of California,[20] and the laws of industrial states on privately owned spurs connecting manufacturing plants with railroads.[21] It should be recognized by permitting estate owners to connect their estates with new main highways by private roads constructed through their neighbor's property upon making just compensation.[22] By a recent decision a law permitting a private Chautauqua company to enlarge its park by resort to eminent domain was declared unconstitutional.[23] But education is a public function, though the ownership in this case was private. Like a railroad it should have been permitted to add to its facilities by the exercise of eminent domain. The determination by the legislature of what was of use to the public should have been binding upon the courts.

6. *Inability of the Legislature to Bargain Away Its Power of Eminent Domain*

While the preceding doctrine has been employed unduly to protect vested interests, this doctrine is for the protection of public interests. It corresponds to the similar inability of a state legislature to bargain away its police power. Thus a legislature may cancel the charter of a railroad company and take its franchise and property by eminent domain, paying full value. Then it may charter a new company and sell to it the franchise and property on satisfactory terms.[24] So too it may authorize a mill dam, on the ground of public benefit, the owners of the mill making just compensation to the owners of agricultural lands flooded.[25] But at a later time when the public benefit would be greater to lower the dam and restore the lands to agricultural uses, this may be done under eminent domain, the owners of the lands paying full value to the owners of the dam for the loss sustained.[26]

7. *The Early Doctrine of No Compensation for Consequential Damages*

In some parts of the country the public owns the fee to streets and other highways, and the abutting owners have an easement thereto. In other parts the title of the owners extends to the middle of the highway, and the public has an easement. In either case, unless there is a special constitutional or statutory provision to the contrary, the owner has no right when he makes improvements to protection from changes in the grade which will decrease or possibly destroy the value of his improvements. There is a superior right in the public to make improvements in its highway, so long as it does not encroach on the abutting owner. It may fill in the street if too low, or it may excavate if too high, no matter what the consequential injuries may be to the abutting owner. He has no redress, no claim for damages. This is the doctrine of all the states except Ohio.[27] This doctrine appears to reflect the necessities of early settlement, but not to be fair to the purchasers of lots upon a properly surveyed and planned city street.

8. *But Compensation for Physical Invasion*

Though there is no compensation for consequential damages in the absence of encroachment on private property, must there be compensation when the public in making its improvement actually encroaches on the property of the abutting owner? This may occur when additional land is temporarily seized for an encampment or a hospital or the dredging of flats. It is a more serious question when waterways have been improved by the erection of dams, and great masses of water and sand sweep in upon a farmer's land in a time of unexpected flood. If this physical invasion is caused by the public improvement the public must pay for the direct injury. This principle is quite in harmony with the preceding doctrine of no compensation for consequential damages, for the injuries here are direct and physical. The leading case is Pumpelly v. Green Bay Co.[28] There may be physical invasion not only by temporary acts of encroachment, or by improvements which cause an occasional inflow of water and sand, but other improvements may cause a physical invasion of smoke and steam which come in such volume as to injure the neighbouring residential property. This was the case in the city of Washington at the mouth of the railroad tunnel which pierces Capitol Hill.

9. *Compensation also for Subversion to New Public Use*

When the elevated railway with its puffing steam engines and rattling passenger cars invaded the streets of New York the abutting property owners looked upon this invasion with horror. Nevertheless their ears became accustomed to these instruments of torture, and they slept the sounder when it was demonstrated that the elevated railroads actually increased the value of abutting property. At the first, however, it was feared that the value of abutting property was appreciably diminished. Therefore the court held in the famous case of Story v. New York Elevated Railroad Co.[29] that the abutting owner had an easement in the street, a right to unobstructed air, light, and access. The building of the railroad was a subversion to a new public use for which the owner was entitled to compensation.

Sometimes ordinary railroads are permitted to use streets, but when they are given exclusive use of part of the street or when the grade is changed for railroad purposes so that the abutting owner is excluded from part of the street, he is entitled to compensation.[30]

But all states do not follow the doctrine of the Story case. In such states it is argued that if public necessity requires such a railroad to accommodate local traffic in the city, it is as much a proper use of a street as are surface car lines, which are usually permitted without making compensation. This is the doctrine of Maryland among other states. There are also minor differences among the states as to the use of streets for drain, gas, and water pipes, for telegraph and telephone poles, and for street railways and steam railways. When telegraph or telephone poles or steam railways actually interfere with an abutter's use of the street, he may demand compensation, but in other cases, as street railways and gas pipes, he is not entitled to compensation.

In all these cases where there is physical invasion of property or subversion to new public use in violation of the abutter's right to the street, the doctrine is that his property is taken either wholly or in part, and for this public taking he is entitled to just compensation. The doctrine of no compensation for consequential damages is still intact.

10. *New Constitutional and Statutory Compensation for Injury*

The injustice frequently done where property is legally only damaged but not taken, has led nearly one-half of the states to add to their constitutions a clause requiring compensation for property damaged as well as taken. In other states, as Massachusetts, a statute has been passed for the same purpose. Indeed in the case of Callender v. Marsh [31] the court invited the legislature to make this correction in the law. This seems strictly fair when a street grade has been officially declared and the owners have been invited to make their improvements in the expectation that the grade was permanent. If afterward a change is made in the grade it is only just that compensation should be made.

The provision in the Pennsylvania constitution is as follows: " Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." [32] Accordingly in the Miller case [33] when the Pennsylvania Railroad extended its abutments out over the street and interfered with the easement of Miller, he was given damages for injury. Illinois has a similar constitutional provision. Therefore, if street grades are so changed that property is damaged, as when a viaduct is constructed high above the original grade, the owner may claim compensation for injury.[34]

11. *Limitation on This New Right to Compensation*

If my neighbor on the corner should catch the Philadelphia disease of converting his basement into a corner grocery, he would greatly reduce the money value of my property, but I would have no redress. If the city should take the same property for a police station or a public school, my property would be greatly injured, but I would not be entitled to compensation for the injury. If the street is devoted to any public use which interferes with my easement I am entitled to full compensation for the injury. If the public were compelled to pay damages for every depreciation of property value due to the exercise of the power of eminent domain, there would be no end of litigation and an intolerable burden would be put on all public utilities that would make progress almost impossible. Accordingly Freund says: "It is therefore not every inconvenience or depreciation of value caused by a public improvement for which the constitutional or statutory provisions in question give a right to compensation, but only the impairment of some benefit which is so directly inherent to the property that it can be recognized as part of the legal right or as in the nature of an appurtenant easement, the impairment thus constituting a legal injury."[35] Thus when Marchant,[36] a Filbert street property owner, sued the Pennsylvania Railroad for injury due to smoke, dust, and noise, he was granted no compensation, for he was entitled to no compensation for depreciation which was due to a public use, carefully and properly conducted.

12. *Eminent Domain Possessed by Both State and Federal Governments*

There is a state and a federal power of eminent domain. The state may delegate this power to railroads and municipalities. Suppose a municipality under its police power undertakes to give equal rights to all taxicabs on the driveway at a railroad station, but the driveway is on railroad property. The decision is that this cannot be done under the police power, but can be under eminent domain.[37] A town may take from a railroad, but a railroad commission cannot take part of a railroad property for a coal shed, because the court says this is not a public purpose.[38] But the author thinks the commission is a better judge of the facts than a court. While the state's power of eminent domain is superior to the same power delegated to its agencies, whether railroads or municipalities, it is doubtful that the federal government can take state property essential to the state in the performance of its governmental functions.[39] Yet the federal government does not hesitate to take all manner of private property, whether already employed for public use or not. The laws of Congress on eminent domain include the taking of canals, lands for naval purposes, housing for war-industry employees, and sites for aviation camps, for munition factories, for nitrate plants, and for river and harbor improvements to be paid for by states and given to the United States. Laws for these and many other purposes were enacted, for the most part, under the war power of Congress, but in peace time Congress has a power of eminent domain in connection with every enumerated power. The site for the federal building at Cincinnati was obtained by the exercise of the federal right of eminent domain, but it is seldom employed for such purposes.[40] When "forts, magazines, arsenals, dockyards, and other needful buildings" are constructed, generally the state gives its consent and then full sovereign power goes to the federal government.[41] The state sometimes takes the property by the exercise of its own right of eminent domain and turns it over to the federal government which makes full payment and receives the same complete power which it exercises in the District of Columbia, possibly with some slight reservation.[42]

[1] Dicey, A. V., *Law of the Constitution*, pp. 1–34.

[2] Beck, J. M., *The Constitution of the United States*, pp. 173–197.

[3] Bryce, J., *Modern Democracies*, Vol. II, pp. 112–128. Fisher, I., "The Prohibition Controversy," in the *American Year Book* for 1927, pp. 19–25.

[4] Blakemore, A. W., *National Prohibition*, p. 5.

[5] *Ibid.*, p. 5.

[6] National Prohibition Cases, 253 U. S. 350.

[7] Corneli v. Moore, 267 Fed. 456. Falstaff Corporation v. Allen, 278 Fed. 643.

[8] Druggan v. Anderson, 269 U. S. 36.

[9] Murphy v. United States, 272 U. S. 630.

[10] United States v. One Ford Coupe Automobile, 272 U. S. 321.

[11] This is the doctrine of Choate v. Trapp, 224 U. S. 665 (1912). Terral v. Burke Const. Co., 257 U. S. 529 (1922).

[12] Chicago, B. and Q. R. Co. v. Chicago, 166 U. S. 226 (1897). Missouri P. R. Co. v. Neb., 164 U. S. 403.

[13] Cooley, T M., *Constitutional Limitations*, p. 649.

[14] Freund, E., *Police Power*, p. 5.

[15] Cooley, T. M., *op. cit.*, p. 649.

[16] Kent, J., *Commentaries on American Law*, Vol. II, p. 340. Mott, R. L., *Due Process of Law*, p. 182, Note 8.

[17] Cooley, T. M., *op. cit.*, p. 659.

[18] *Ibid.*, p. 661, Note 5. Hall, J. P., *Constitutional Law*, p. 206. Shoemaker v. United States, 147 U. S. 282 (1893); Shiras, J.: "In the memory of men now living, a proposition to take private property, without the consent of the owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power." Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234. The taking of land by municipalities for public parks is recognized as taking for public use.

[19] Head v. Amoskeag Manufacturing Co., 113 U. S. 9. Talbot v. Hudson, 16 Gray 417 (Mass. 1860).

[20] Constitution of Calif., Art. XIV.

[21] Harvey v. Thomas, 10 Watts 63 (Pa. 1840). Hays v. Risher, 32 Pa. 169. Union Lime Co. v. Chicago R. Co., 233 U. S. 211 (1914).

[22] Cooley, T. M., *op. cit.*, p. 657. He thinks it not allowable to authorize private roads to be laid out across the lands of unwilling parties by eminent domain. Taylor v. Porter, 4 Hill 140 (N. Y. 1843). But several constitutions provide for such taking, as N. Y.

[23] Fountain Park Co. v. Hensler, 155 N. E. 465 (Ind. 1927).

[24] Eastern R. Co. v. Boston R. Co., 111 Mass. 125.

[25] Head v. Amoskeag M. Co., 113 U. S. 9.

[26] Talbot v. Hudson, 16 Gray 417 (Mass. 1860).

[27] Freund, E., *op. cit.*, p. 544. Callender v. Marsh, 1 Pick. 417 (Mass. 1823). McCombs v. Akron, 15 Ohio 475 (1846).

[28] 13 Wall. 166. Freund, E., *op. cit.*, p. 543.

[29] Story v. New York Elevated R. Co., 90 N. Y. 122.

[30] Hall, J. P., *op. cit.*, p. 213. Freund, E., *op. cit.*, p. 544.

[31] 1 Pick. 417.

[32] Pa. Constitution of 1874, Art. XVI, Sec. 8.

[33] Pennsylvania R. Co. v. Miller, 132 U. S. 75 (1889).

[34] Chicago v. Taylor, 125 U. S. 161 (1887).

[35] Freund, E., *op. cit.*, p. 545.

[36] Marchant v. Pennsylvania R. Co., 153 U. S. 380 (1894).

[37] Delaware, L. and W. R. Co. v. Morristown, 276 U. S. 182.

[38] Ferguson v. Illinois C. R. Co., 210 N. W. 604 (Iowa, 1926).

[39] Willoughby, W. W., *On Constitutional Law*, Vol. I, p. 119.

[40] Kohl v. United States, 91 U. S. 367 (1875).

[41] Willoughby, W. W., *op. cit.*, Vol. I, p. 378.

[42] Kohl v. United States, 91 U. S. 367. Lowe v. Lowe, 133 Atl. 729 (Md. 1926): In this case it is held that the courts of the state cannot assume jurisdiction over a divorce action between persons who were never residents of the state, but are permanent residents of the ceded district. Perry Point was ceded by Maryland to the United States during the Great War, yet Congress has enacted no law applicable to this case.

CHAPTER XXX

EMINENT DOMAIN: EXCESS CONDEMNATION, ZONING, AND HOUSING

1. *Eminent Domain and Police Power in Relation to Excess Condemnation, Zoning, and Housing*

The industrial revolution forced great numbers of young people from the farms and villages to the industrial centers. When young Colgate was walking toward New York an old man advised the lad when he reached the great city to join a church and to resolve to be the best soap maker in the United States. This advice he made the double aim of his life, and his name is perpetuated by a distinctive university. The old immigration brought other thousands of young people to the cities, and up from them have come great leaders of men, kings of business, and philanthropists who contribute our latest university buildings. The new immigration is more recent, but its members have added immeasurably to the artistic side of our cosmopolitan life, and every list of multi-millionaires and benefactors, of men of science and achievement, contains representatives of this large element of our population. Many thousands of these young people have made worthy contribution to the civilization of our time, but other thousands of these several classes, perhaps a minority, have yielded to the allurements of great cities. Torn from their former restraints of religion and family, they have succumbed to vice, intemperance, and crime. Thriftless and lawless, or weak and unfortunate, they have created the slums, where their numerous children are ill-born and ill-nurtured. They and their children, too frequently, have never had a chance.

What shall be done about it? Many think, and think rightly, that all will be lost unless there may be another religious revival as powerful as the Wesleyan revival of the eighteenth century. Others hope to tame the wild passions of men by the gentle ministrations of the arts. No doubt there is a civilizing power in all the arts — music, drama, painting, sculpture, and assuredly literature, but the arts may turn pimps and panders. Another suggested remedy combines the motives originating in religion and the arts in proposing to change the physical environment of the unfortunate, and not only of them but of all the people, making our cities fit to live in and productive of clean, healthy, and noble citizens.

A new gospel was the advocacy of the city beautiful with its parks and playgrounds, its diagonal boulevards and avenues, its restricted districts, and finally its zoning for all purposes and its better housing. Resort was naturally made to the police power but vested interests took alarm. Then reliance was put on eminent domain, but this too had its limitations and prohibitive costs. Excess condemnation plainly comes under eminent domain. Zoning may be under the police power or eminent domain or both. Housing when employed for slum-clearing falls under eminent domain but when employed for the building of satellite towns[1] falls under the police power.

2. *Definition of Excess Condemnation, According to Cushman*

"Excess condemnation may be said to be the policy on the part of the state or city, of taking by right of eminent domain more property than is actually necessary for the creation of a public improvement and of subsequently selling or leasing this surplus."[2]

But is the purpose public? If the legislature declares this purpose to be public, Kent[3] would say it is public, unless the determination is so palpably absurd that no reasonable person could hold it public. Cooley[4] would denounce it as not public, for you cannot take from A and give to B even with compensation. Yet it is difficult to square the doctrine of Cooley with the practices of the past.[5] Eminent domain has been employed to flood privately owned lands for a mill, and later to condemn the easement and lower the dam, the benefited private parties in each case making just compensation.[6] In arid country eminent domain has been used to connect private property with irrigation canals by the construction of ditches through other private property. This is taking from A and giving to B with compensation to A made by B. The same privilege has been given to the owners of factories desiring to connect with a railroad, but it has been denied to the owners of agricultural lands desiring to connect with new highways. By act of the legislature of Massachusetts the Back Bay Flats were condemned, the public acquired the whole region by eminent domain, and a handsome profit was made by subsequent sale.[7] By excess condemnation Cushman means a more radical action than these rehabilitation schemes, for he would take more than the land absolutely required for the improvement and would sell such excess to private parties. Yet in a sense this excess condemnation is necessary, as we will see, and it is but a step beyond what had been done previously and sustained by the courts.

3. *The Problem of Remnants of Land*

Nearly every city, however well planned, requires changes to meet the needs of modern traffic. Many cities are not well planned. The most inconvenient are the checkerboard plans without diagonal streets. Furthermore a new social need is that of boulevards, as those of Chicago and Philadelphia. The city beautiful means happiness, health, civic pride, and good economic policy.

When streets are widened and boulevards are constructed all sorts of remnants are made. When a new street was opened to lead to the Williamsburg Bridge[8] in New York there were strips of land which varied in depth from ten feet to less than a foot. They prevented other properties from having a frontage on the street. These remnants obstruct the development of the neighboring property. They bring definite financial loss to the city, for their lack of value prevents any substantial assessment upon them for the improvement. There have been cases in New York where public improvements were completed, but the abutting property would not sell because of unsightly remnants. The city in condemning property was obliged to pay full value for entire lots but did not take title to the remnants. The owners of the remnants could not sell to advantage in many cases, but often they attempted to hold up the owners of neighboring property by the Peanut Parthenons they permitted to occupy the remnants. Now if the city could take these remnants with right to sell, generally the cost would be no greater than when the remnants were not taken. It could then sell the remnants to abutting owners or make them little garden spots, bringing charm and beauty to the neighborhood.

The first law permitting an American city to acquire remnants by eminent domain was passed by the legislature of New York in 1812,[9] giving the desired right to New York City, but the highest court of the state declared the law unconstitutional as taking private property for a private purpose. In 1903 [10] the legislature of Massachusetts granted a similar power to cities of that state. The power was exercised and not declared invalid.[11] Finally constitutional amendments were adopted in both states in 1912 [12] permitting excess condemnation, and this includes the right to take remnants by eminent domain. Other states took similar action as will be seen.

4. *Excess Condemnation for the Protection of Public Improvements*

This is frequently for esthetic protection. Esthetics has long been recognized in the taxing power. It has attained a limited recognition in eminent domain, and only recently has it been sanctioned in police power. But this employment of the power of eminent domain is not only to protect the beauty of a park, parkway, or other public improvement; it also promotes health, play, convenience, and financial value.

It is often good policy to purchase more land than is immediately required for a public purpose, whether a city hall, library, or school. Sometimes open spaces have cost the city of New York more than the vast tract now Central Park.[13] Public buildings should be properly grouped. This involves the purchase or taking by eminent domain of more land than is presently required and selling or leasing or merely holding — selling or leasing with restrictions for the protection of the public improvement.

When the legislature of Connecticut passed a law giving a city power to regulate the height of buildings under the right of eminent domain the court invalidated the act, but when the legislature of Massachusetts gave a similar power to Boston and the council passed an ordinance for the protection of Copley Square,[14] limiting the right to build to a height of ninety feet, the ordinance was sustained. Indiana passed a similar law, not for the regulation of the sky line, but of the building line, and this too was sustained. If the public for the protection of its improvements may take by eminent domain the right of abutting owners to build beyond a certain height or nearer the street than a certain line,[15] why may it not take the whole of abutting property for the protection of its improvement, of course making just compensation?

The movement became very general to employ excess condemnation for the protection of public improvements. Some fifteen state legislatures passed laws or proposed amendments authorizing the use of excess condemnation by municipalities. The legislature of Massachusetts asked the court for an advisory opinion on the constitutionality of of such legislation.[16] The court gave a negative answer, whereupon an amendment was submitted to the people which was ratified at the polls in 1912.

But if the only provision of a state constitution endangering excess condemnation were a provision similar to the just compensation clause of the federal constitution, why pass an amendment to the state constitution, for excess condemnation might still be held to violate the due process clause of the 14th Amendment? Why not expect the courts to enlarge their definition of public purpose, away from Cooley and back to Kent, thus meeting the manifest needs of the present? An act of the legislature of Pennsylvania, as in Ohio,[17] permitted the employment of excess condemnation without previous amendment of the state constitution. The Fairmount Parkway[18] improvement had long been before the people of Philadelphia, and the project had passed through various stages, but it was felt that a grant of new power from the legislature was necessary. Accordingly the legislature gave the power to take private property within 200 feet of the parkway and protect the same by resale with restrictions. In 1912 regulations for the protection of the parkway as to height, character and type of construction, and purposes of buildings, were adopted. A large section of land abutting on the parkway was taken under the provisions of the act. In 1913 an ordinance was passed authorizing a contract with the Bell Telephone Company which agreed to erect a building which would be an ornament to the parkway. The larger part of the property selected was owned by a life insurance company which set up the claim that the act authorizing the excess condemnation was not a valid exercise of the power of eminent domain. The state supreme court declared the act unconstitutional and void.[19] A complication in this case was that the insurance company was willing to retain the property and erect a structure on the same terms agreed upon with the Bell Company. It therefore seemed unfair to many and probably to the court that the insurance company was not permitted to do this. Ordinarily it ought to be done. Yet it is necessary to the success of such a plan that the city be enabled to take all the abutting property and replot the lots with proper frontage. Therefore it ought not to be compelled to turn back the property to the same owners, yet as nearly as possible their interests ought to be protected. This decision was a great discouragement to the use of excess condemnation. An amendment to the state constitution was passed by the legislature in 1915,[20] and if passed by the legislature in 1917 would have been submitted to the people as in Massachusetts and New York, but the legislature failed to repass the resolution. It may be that the same reactionary elements which now oppose zoning in Philadelphia blocked the submission of an amendment for excess condemnation. Such amendments were adopted in Massachusetts, Ohio, Wisconsin, New York, and Rhode Island, but they were defeated in California and New Jersey.[21]

5. *Excess Condemnation for Recoupment or Profit*

The building of diagonal streets through congested parts of a city, however imperative the need, is a costly undertaking. Without excess condemnation the expense is frequently prohibitive. Parkways and boulevards do not serve their purpose if they are lined by hideous ruins, and prospective purchasers will not buy. So the rise in value of surrounding property with increased taxes does not lighten the financial burden of the city. Parkways in suburban districts may vastly increase the value of abutting property, all due to the outlay of the city's money. Therefore it is claimed that the city ought to enjoy this increment of value. Sometimes the entire expense of the undertaking could be met in this way.

Another method is more frequently employed in American cities to solve in part the financial problem. It is the special assessment. It works well, though it does not go far enough in the matter of remnants and replotting for the protection of a public work. A combination of the two plans is the most promising, taking the immediate frontage and back to a proper depth, say 200 feet, and then an assessment on all the rest of the benefited lands, divided possibly into zones based on degrees of benefit.[22]

6. *Employment of Excess Condemnation Abroad*

Excess condemnation in England dates back to the act of 1845 [23] which provided that no owner of a building could be compelled to part with the ownership of a portion of it if he was willing to sell the whole, and with certain exceptions the owner of a vacant lot could compel the authorities to purchase the whole if they took part. Provision was made for the sale of surplus land not required for the improvement. In the years following 1845 there was the necessity in London of widening many streets and opening new streets. The endeavor of the Metropolitan Board of Works [24] was to use excess condemnation to help pay the great expense of such improvements. Sometimes this was accomplished with marked success, but more frequently the public lost money. These losses were due to three causes, that the board paid more for land than it was worth, regularly adding a bonus of ten per cent, that exceedingly high prices were paid to buy out trade interests, a custom which happily we do not have, and finally that there was corruption in the board itself. In 1888 [25] the whole system was changed, the Metropolitan Board was abolished, and the London County Council was created, one of the finest legislative bodies in the world. One of the significant achievements of recent years was the construction of the Kingsway,[26] a wide thoroughfare connecting Holborn and the Strand. Liberal power of condemning land in excess was given to the council with provision for resale with restrictions. It was further required that all persons of the laboring class who were dishoused should be suitably rehoused by the council within one mile of their previous location. The gross cost ran up to twenty-five million dollars, but it was estimated that the sale of land would reduce the net cost to less than four million. The venture proved a success. In a great city like London it is necessary to employ excess condemnation on the abutting property and special assessments on neighboring property to help bear the expense, for without excess condemnation the abutting property could not be used to full advantage and the street would not meet the social needs for which it was created.

Excess condemnation has been widely employed on the continent. It has helped make Paris [27] the most beautiful of cities. It has been used with great advantage by Brussels [28] and many other cities. But as our legal system is derived from England the successful use of excess condemnation in many English cities forms a legal precedent for our own resort to the same expedient.

7. *The History of Zoning in Minnesota*

While the legislatures and courts were still debating the expediency and validity of laws and ordinances for excess condemnation, a more comprehensive reform had gotten the public ear under the name of zoning, and so overwhelming has been the popular acceptance of the new expedient that the courts have turned right-about-face and reversed their earlier decisions. In 1927 zoning ordinances had been adopted by 460 cities in the United States. Already one-half of the urban population was living in zoned cities. They were distributed among thirty-eight states, but New York alone had 77 such cities.[29] The history of zoning in Minnesota is so interesting and typical that it may be recounted as representative of the changed legal attitude throughout the greater part of the country.

Legislation was passed in 1913 under the police power, applicable to the three largest cities of Minnesota, authorizing the councils "upon petition of fifty per cent of the property owners of the district to be affected" to "designate residence districts in such cities and prohibit the erection and maintenance of hotels, stores, factories, warehouses, dry-cleaning plants, public garages or stables, or any industrial establishment or business whatsoever, tenement and apartment houses."[30] These acts of 1913 were bitterly resented by parties who thought their liberties invaded, and there was fear that the legislation would be declared unconstitutional. Therefore an act was passed in 1915 under the right of eminent domain, providing for restricted residence districts, and the list of proscribed uses was enlarged.

The legislation of 1913 under the police power first came before the supreme court of the state. A retail store was in process of construction when the law of 1913 was passed, making such a building a nuisance. The owner had previously obtained a license to build, but now he could not obtain a permit to wire his building. Three of the five judges decided in 1916 that the ordinance invaded "property rights secured to the owner by both the state and federal constitutions."[31] The act of 1915, based on the power of eminent domain, came before the same court in 1919. The building inspector had refused to grant a permit for the erection of an apartment house in a restricted residence district. The court divided as before, and decided that the so-called use taken by the council was a negative use, and not a public use, and that it was for esthetic grounds and might threaten the homes of the poor as not suited in architecture to the community surroundings. "It is not believed that the public welfare can be promoted by such legislation,"[32] they said in 1919, but a few months later one of the three judges, composing the majority, came to more clearly understand the social necessity of zoning in the interest of better homes for the people generally, and so when the case was reargued in 1920, the former minority had become the majority, and then the court decided that such restrictions "constitute a taking for a public purpose."[33]

In 1921 the legislature in passing a comprehensive zoning act, returned to the police power as its basis. In 1924 the city of Minneapolis adopted a new ordinance under this act, and the validity of the new ordinance came before the court in 1926. There was a unanimous court. The judge who had written the opinion of the court invalidating the police power act of 1913 now wrote the opinion upholding the police power act of 1921. He said the police power is "in its nature indefinable, and quickly responsive, in the interest of common welfare, to changing conditions."[34] He showed that the trend of decisions throughout the country was "in the direction of sustaining police power measures for zoning, and that the policy of such restrictions is to be settled by legislative bodies and not by the courts."[35]

8. *The Zoning Ordinance of Euclid Village*

All courts have not arrived at the liberal position finally attained by the supreme court of Minnesota. There was the danger that the United States Supreme Court, if a radical zoning ordinance came before it, might declare it invalid as not a proper exercise of the police power or of eminent domain. The village of Euclid, a suburb of Cleveland, adopted complicated zoning provisions set forth in an "ordinance in tedious and minute detail." There are six use districts, three height districts, and four area districts. Every lot is in three overlapping districts. When the validity of this ordinance came before the United States Supreme Court, no advocate of zoning could ask for a more clear-cut decision sustaining the principle. It was Mr. Justice Sutherland who wrote the opinion. One would think him quoting from Mr. Justice Holmes when he said: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." The question on which the court had not before spoken was on the validity of the creation of residence districts from which every business including even hotels and apartment houses was excluded. He found that the trend in state decisions was toward the broader view. That view he did not condemn, but Mr. Justice Butler was among the dissenting judges.[36]

9. *The Maryland-Washington Metropolitan District*

The creation of metropolitan regions is a popular movement in these days. It contemplates the coordination of great cities with their suburban towns and outlying districts, not forcing the annexation of unwilling communities, but attempting helpful cooperation.[37] A greater Washington is encircling the Washington of the District of Columbia. There is a strong tendency for enterprising white citizens who desire self-government and segregation to move out into encompassing Maryland. There has therefore been created the Maryland-Washington Metropolitan District, comprising 141 square miles of territory in two counties, and having a population already of 50,000.[38] Over it is placed the Maryland-National Capital Park and Planning Commission which will cooperate with the federal commission of similar name. The governor of Maryland appoints the six commissioners who are an executive and initiating body, reporting to the district councils of the two counties, popularly elected. "The new commission is vested with sweeping powers for zoning; subdivision control; approval of locations of streets and highways, parks, playgrounds, bridges, public buildings, and public properties, public utilities and terminals, whether publicly or privately owned, aviation fields and other open spaces; and the preservation of forests and natural scenery." [39] It is hoped that the National Capital may be surrounded "with ideal suburbs, properly zoned for both beauty and utility." [40]

10. *Fundamental Rights versus Zoning*

Though the governor and legislature of Maryland have united in giving the zoning privilege to various urban communities, the courts of that state have been backward in the adequate recognition of the modern needs of society. Yet the rights of citizens as individuals must receive a just and reasonable recognition, so it is interesting to watch the scales of justice dip now to the right and now to the left. The zoning authorities sometimes are inconsistent and arbitrary in their rulings, and thus invite judicial rulings which defeat the very purpose of zoning. The Baltimore council and zoning board of appeals thus invited hostile judicial action, and the courts of the state have limited the purpose of zoning to the prevention of the hazards from fire and of menace to public health, security, or morals.[41] Similarly the court of Mississippi permitted the erection of a gasoline filling station in a restricted district on the ground that the zoning act delegated the right to regulate, not the right to prohibit.[42] So too the supreme court of New Jersey awarded a writ of mandamus to permit a public garage within the prohibited distance from a school by a strained interpretation of the law.[43] A lower court of Missouri by mandamus sought to permit an automobile salesroom in a restricted district on the ground that the application was made before the ordinance went into effect, but the state supreme court reversed the decision.[44] Yet there are limitations on zoning ordinances which arise in the nature of justice and not in the hostility of its ministers to zoning. Thus when the zoning authorities have destroyed the commercial value of property in a manufacturing neighborhood by restricting it to residence purposes, the court rules that they come within the ban of the 14th Amendment.[45] When a village bars from a restricted residence district a Jewish home for orphan children consisting of separate cottages under careful supervision, the court rules the ordinance as related to the petitioner arbitrary and unreasonable, and enjoins its enforcement against him.[46] When the trustee for a philanthropic home for the poor is barred from a restricted district by the action of the majority of the owners of the neighboring property, the Supreme Court of the United States declares that his right to use the property for such purpose is within the protection of the federal constitution.[47] Yet when an owner under cover of the permission of a zoning ordinance holds himself no longer bound by a covenant for restricted uses, he still may be held to the previously covenanted prohibitions.[48]

11. *The Housing Ordinance of New York*

Zoning ordinances lay down needful restrictions, but they do not build the houses. Philanthropy is unable without government protection and cooperation to meet the need of the inadequately housed. We must turn a moment to English precedents. "In the forty years preceding the war, over ten million dollars had been expended by the local authorities in London alone to clear about a hundred acres which had housed nearly fifty thousand persons. But in 1911 London still had nearly 25,000 admittedly unsanitary houses." [49] Earnest effort was made before the war to improve the housing conditions, but after the war it became imperative, so great were the distress and discontent, added to the disorganized industrial situation and the demoralizing unemployment. It was determined to build over a million small houses, one hundred.thousand a year, the houses cost-ing on the average 400 pounds, the national government contributing 41 pounds and the local government 5 pounds. The burden has been appalling, but it was " a long-range . . . investment in good citizenship which promises dynamic returns to the industrial and political stability of England." [50]

The situation in New York city [51] was not so desperate, but it was " found through years of endless effort and public discussion that the gigantic work of rebuilding these unsanitary and unlivable areas of the city cannot be done entirely by private initiative or interest, however philanthropic, and that public, community, and governmental measures should be invoked to begin a comprehensive cleaning up of the unlivable housing conditions described in exhaustive reports made upon the subject." [52] In 1927 the board of estimate and apportionment, under the authorization of state law, proposed a local law which was approved by the council, referred to the people at the polls in the autumn of that same year, and ratified.[53] It was a strangely radical law, running counter to the fixed convictions of the present writer and of many others whose general attitude is liberal and progressive. It proposed to employ excess condemnation for the acquisition of real property in slum districts, additional to the property taken for widened streets, and to lease such additional property to limited-dividend or non-dividend corporations which would build houses with rent limited to eight dollars per room. No payment was contemplated for the use of the land, and so it would be in part a public charity. It was this feature that was strongly condemned.[54] And yet there are these many thousands of unfortunates. They will prey on society and take their toll, unless society extends to them a hand and gives them a lift to better things. Subventions and doles are dangerous, but who would abolish all relief to the poor?

[1] Bing, A. M., " New York's First Satellite Town," *National Municipal Review*, Vol. 17, p. 142. Description of Radburn, N. J., as an outgrowth of Sunnyside in Long Island City.

[2] Cushman, R. E., *Excess Condemnation*, p. 2.

[3] Kent, J., *Commentaries on American Law*, Vol. II, p. 340.

[4] Cooley, T. M., *Constitutional Limitations*, pp. 657 ff.

[5] State ex rel. Timber Co. v. Superior Court, 77 Wash. 585 (1914), holding "that a statute authorizing the owner of land so situated that it was necessary to have an exit over land of another to condemn a way over the neighbor's lands is constitutional as it promotes the public welfare." See *American Year Book* for 1914, p. 253.

[6] French v. Braintree Man. Co., 23 Pick. 216.

[7] Moore v. Sanford, 151 Mass. 285 (1890).

[8] Cushman, R. E., *op. cit.*, p. 25.

[9] *Ibid.*, p. 59.

[10] *Ibid.*, p. 61.

[11] *Ibid.*, p. 287. The court "gave its opinion that the law was valid."

[12] *Ibid.*, p. 107.

[13] *Ibid.*, p. 75.

[14] *Ibid.*, p. 91. Freund, E., *Police Power*, p. 163.

[15] A recent decision upholding setback lines is Harris v. State, 155 N. E. 166 (Ohio).

[16] Cushman, R. E., *op. cit.*, pp. 106 ff.

[17] *Ibid.*, p. 97: the law of 1902.

[18] *Ibid.*, pp. 109 ff.

[19] Pennsylvania Mutual Life Insurance Co. v. City of Philadelphia, 22 Pa. Dist. Reports 195; 242 Pa. St. 47 (1913).

[20] Cushman, R. E., *op. cit.*, p. 100.

[21] *Ibid.*, pp. 218 ff.

[22] *Ibid.*, p. 121.

[23] *Ibid.*, p. 157.

[24] *Ibid.*, p. 158.

[25] *Ibid.*, p. 167.

[26] *Ibid.*, p. 171.

[27] *Ibid.*, p. 146.

[28] *Ibid.*, p. 153.

[29] Nolen, J., "Twenty Years of City Planning," in *National Municipal Review*, Vol. 16, p. 371.

[30] Anderson, W., "Zoning in Minnesota," in *National Municipal Review*, Vol. 16, p. 624.

[31] State ex rel. Lachtman v. Houghton, 134 Minn. 226 (1916); 158 N. W. 1017.

[32] State ex rel. Twin City Building and Investment Co. v. Houghton, 144 Minn. 1; 174 N. W. 885 (1919).

[33] 176 N. W. 159 (1920).

[34] State ex rel. Beery v. Houghton, 164 Minn. 146 (1926); 204 N. W. 569; affirmed by U. S. Supreme Court in Beery v. Houghton, 47 S. Ct. Rep. 474 (1927).

[35] Anderson, W., in *National Municipal Review*, Vol. 16, p. 628.

[36] Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926).

[37] Reed, T. H., "The Region, a New Governmental Unit," in Crawford, F.C., *Readings in American Government*, p. 742.

[38] Smith, J. B., "Washington, D. C., via Maryland," in *National Municipal Review*, Vol. 16, pp. 620 ff.

[39] *Ibid.*, p. 622.

[40] *Ibid.*, p. 623.

[41] Applestein v. Osborne, Inspector of Buildings, 143 Atl. 666 (1928). Took, C. W., Comment on above case in *National Municipal Review*, Vol. 18, p. 102.

[42] Dart v. City of Gulfport, 113 So. 441.

[43] Savitz-Denbigh Co. v. Bigelow, 137 Atl. 439.

[44] State v. Christopher, 298 S. W. 720.

[45] Nectow v. City of Cambridge, 48 S. Ct. R. 447.

[46] Village of University Heights v. Cleveland Jewish Orphans' Home, 20 Fed. (2d) 743.

[47] State of Washington ex rel. Seattle Co. v. Roberge, 278 U. S. 116 (1928).

[48] Ludgate v. Somerville, 256 Pac. 1043.

[49] James, H., "A Million Small Houses for Great Britain," in *National Municipal Review*, Vol. 17, p. 457.

[50] *Ibid.*, Vol. 17, p. 459.

[51] Purdy, L., "Subsidized Housing in New York," in *National Municipal Review*, Vol. 16, p. 700.

[52] Resolution of the board of estimate and apportionment of New York, June 28, 1927.

[53] "A doubtful slum clearance proposal approved by voters," *National Municipal Review*, Vol. 16, p. 743.

[54] Condemned by Mr. Purdy and by *National Municipal Review*.

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